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# AMERICAN STATE TRIALS

*A Collection of the Important and Interesting Criminal Trials which have taken place in the United States, from the beginning of our Government to the Present Day.*

**WITH NOTES AND ANNOTATIONS**

**JOHN D. LAWSON, LL.D.**  
**EDITOR**

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(XI)

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By JOHN D. LAWSON

TO  
MAJOR BOYCE THOMPSON  
OF  
TORONTO, CANADA

IT HAS BEEN MY AIM AND PLEASURE TO  
DEDICATE THE SEVERAL VOLUMES OF THIS  
WORK TO MY LONG TIME FRIENDS WHO  
HAVE ACHIEVED FAME AND FORTUNE IN  
LAW, IN SCHOLARSHIP AND IN AFFAIRS,  
I DEDICATE THIS VOLUME TO YOU IN REC-  
OGNITION NOT ONLY OF OUR FRIENDSHIP  
OF HALF A CENTURY, BUT OF THAT OF OUR  
FAMILIES WHICH HAS CONTINUED THROUGH  
THREE GENERATIONS.



## PREFACE TO VOLUME ELEVEN

The Fries Insurrection, named after its leader, and which brought him and several of his associates into court, where they were tried, convicted and sentenced for treason and conspiracy (*John Fries*, p. 1; *Conrad Marks*, p. 175; *Henry Shiffert and Others*, p. 178; *Jacob Eyerman*, p. 189) began in a small and amusing way and ended in the defeat of the dominant political party. A woman in the far northeast corner of Pennsylvania threw a pail of water on a revenue officer who was engaged in what seemed to her the impertinent occupation of counting her windows; he resented the insult and endeavoring to catch her husband, was caught himself; the marshal who went after the offenders was also caught; and an army as large as that which captured Burgoyne was marched up to disperse insurgents who dispersed of their own accord as soon as they found that the counting of windows was not merely the frivolous pastime of an idle exciseman, but was an incident to a tax laid by a government having both the power and the will to enforce its own legislation. Several of the culprits were brought to Philadelphia to be punished; but hardly had their ringleader been arraigned when Judge Chase flung upon the table where the defendants' counsel were sitting, a paper which he declared contained his views on the questions about to arise. They at once abandoned the defense, intimating that decision before argument was as insulting to the bar as argument after decision was derogatory to the bench; and after a fruitless attempt on the part of the court to wriggle out of the difficulty, the case proceeded



with no lawyer at all on one side and but half a one on the other—for a lawyer without an opponent is but half of himself; and the first result was that in a few hours John Fries was convicted of treason; the second that in a few years Judge Chase was impeached for misdemeanor. In the meantime, a day or two after the conviction, was to be seen Mr. Adams—"an extraordinary sight" as Mr. Pickering called it—shaking before the eyes of his astonished cabinet a pardon by which was dissipated the only positive result of a month's litigation and a six months' campaign. Nor did the consequences stop here; for through the rupture which his pardon was one of the principal causes in producing, the recoinnoitering of the windows in Northampton county did not cease to be felt until the administration was destroyed and the Federal party distracted.<sup>1</sup>

The impeachment of *Judge Samuel Chase* (p. 197) is a landmark in American history, for it was the last aggressive battle of the Jefferson Republicans for the control of the judiciary. They endeavored to make the impeachment and removal from office which the Constitution provided for, not a judicial function, but a mere inquest, and to have the Congress decide that this process need imply no criminality, but that where a judge held what the majority party considered dangerous opinions he could be removed from office and another man put in his place. The Senate was not to be regarded as a Court of Justice, but simply a part of the constitutional machine for making appointments and removals.<sup>2</sup>

In the first two decades of our national history, the bench by meddling in politics to an extent almost un-

<sup>1</sup> Dr. Wharton's Introduction to his *State Trials*, p. 2.

<sup>2</sup> *John Randolph's Life* by Henry Adams (Boston, 1883).

thinkable today, had given abundant cause for retaliation. Says Dr. Wharton:

It was not the least of the vices with which the early construction of the constitution was infected, that the judiciary so far from being regarded as a separate estate of equal dignity with its sisters did not hesitate to desert its own sovereign function for the purpose of entering into their service. At the very outset Mr. Jay held at the same time the offices of Chief Justice and Secretary of State for nearly six months; and afterwards while retaining the Chief Justiceship did not scruple to undertake the mission to England which kept him from the bench from April 1, 1794, to June 29, 1795, when at last he resigned not because he thought the two offices incompatible but because he was elected to a third, that of Governor of New York. On February 27, 1799, Mr. Ellsworth, then Chief Justice, was commissioned as Minister Plenipotentiary to France, holding on to the chief justiceship until October, 1800, and resigning then only on the ground of ill health. On January 20, 1800, Mr. Marshall, the Secretary of State, was nominated as Chief Justice, presided during the whole of February term in the Supreme Court, and only left the secretaryship on March 4, 1801, on the incoming of Mr. Jefferson, discharging in the meantime the duties of the two offices concurrently on the same day, issuing reports in the one capacity and delivering judgments in the other. To these cases the precedent of the English chancellor was scarcely in point as he possessed no criminal jurisdiction; and in the only instances in England where a common law judge has blended judicial with ministerial duties, professional as well as public opinion has now determined that a great error was committed and that few things could be so improper as for the executive who directs a prosecution to become the judge who enforces it. With us objections still stronger exist. The judges, and eminently so those of the Federal Supreme Court, are not only the construers of all laws, whether established by treaty or legislation, but the arbiters of their constitutionality; and to commit to them the office of interpreting the laws which they themselves make or of making the laws they themselves interpret is a consolidation of power inconsistent with the genius of a government of reciprocal checks. But the mischief did not stop here. A judge who becomes a statesman is in some danger of becoming a partisan, and though neither of the three eminent men who first took the disease received it in its worst type, yet in those of their associates to whom they communicated it, it ranged with malign vivacity. At the beginning of August, 1800, Judge Chase left the bench to stump the State of Maryland on behalf of the existing administration, and the result was

that the court, the Chief Justice being then on the French mission, was left for a whole term without a quorum. There was not a charge to a grand jury which was not at the same time a party harangue, differing in the several cases it is true, in intensity, but the same in design; and even the guilt of a criminal was sometimes tested as much by the dogmas of the politicians as the rules of the judge. The State courts, of course, did not hesitate to follow this august example. Of six presidential electors chosen that year in New Hampshire, three were members of the Supreme Judicial Court and one of them thought proper to select the opening of a term as the occasion for the personal castigation of a political opponent. In Vermont one of the county judges became so strongly impregnated with what Mr. Ames might have called the French effluvium as to sit on the bench in a liberty cap. In Massachusetts the chief justice in a charge to a grand jury denounced "the French system-mongers from the quintumvirate of Paris to the Vice-president and minority of Congress as apostles of atheism and anarchy, bloodshed and plunder." In New York, Judge Cooper broke up an election by threatening to commit anybody who challenged voters favorable to his own way of thinking, and even Chancellor Livingston sullied his brilliant name by a system of political agitation so daring as to gain the motto which afterwards clung to the capable and ambitious family of which he was the head:

. . . Rem, facias rem,

Si possis recte, si non, quoque modo, rem.

That the same vice ran through the New Jersey courts appears from a very able pamphlet now extinct, published by a learned jurist of that state, and even the fine judicial parts of the first Chief Justice of Pennsylvania, were marred by a partisanship as undisguised as it was efficient. It is not necessary to go further south to show that the courts of the states did not hesitate to adopt in its fullest development the system of politico-judicialism promulgated by the supreme bench of the Union.<sup>3</sup>

Judge Chase was then no better or no worse in respect to political energy than most of his colleagues.

With the exception of certain brushes with the bar, his civil duties were discharged with learning, fairness and ability. His decisions even when professional opinion was most strongly set against him were always acquiesced in as judicious and impartial. His arbitrariness was that rather of the temper than of the understanding,

<sup>3</sup> Dr. Wharton's Introduction, *ante*.

for while on the one hand he was ever ready to assert authority, on the other he was singularly averse to assume jurisdiction. Thus as has been noticed at the very time when his invasion upon the rights of counsel and parties were keeping the profession in an uproar, he declared in the teeth of the expressed opinions of every member of the court that the federal judiciary had no cognizance of a common law prosecution; and soon afterwards he announced that he could not see on what authority the Supreme Court could pronounce an act of Congress unconstitutional. . . . He was a man of personally amiable disposition, a good lawyer, possessed of a robust and clear intellect, intelligent, industrious, intrepid.<sup>4</sup>

Irascible, vain and overbearing, and sometimes tyrannical, but learned, able, patriotic and of spotless honor, with an instinct for tumult and a faculty for promoting insurrection at the bar, moving perpetually with a mob at his heels, a suite from which, as Dr. Wharton writes, even the judicial office could not separate him, he trusted with general success to his fearlessness to extricate himself from the disorders which his imprudence fomented. Averse to the assumption of jurisdiction, yet harsh in the manner of exercising that which he had; with a quick perception of the spirit of the Constitution and an intellect conspicuous for its clearness, he presents as an American Thurlow one of the most singular yet striking figures in our judicial history.<sup>5</sup>

All the charges except two grew out of the trials of Callender<sup>6</sup> and Fries.<sup>7</sup> They amounted to no more than bad manners on the part of the judge and erroneous decisions on doubtful questions of procedure and evidence. To allege as a ground of impeachment that a judge had decided incorrectly, would make every judge who was reversed by an appellate court liable to a similar fate, and it is interesting to notice that one of the strongest articles growing out of the Fries trial viz.: that he had announced the law before counsel had

<sup>4</sup> *Id.*

<sup>5</sup> Carson's History of the Supreme Court of the United States, Vol. I, p. 183.

An interesting picture of Judge Chase in the Callender Trial will be found in the preface to 10 Am. St. Tr. xxiii.

<sup>6</sup> 10 Am. St. Tr. 813

<sup>7</sup> *Post*, pp. 146-174.

addressed the jury, is now the statutory practice in both civil and criminal trials in a large number of the states. The other two charges, viz.: that at Wilmington he had told the grand jury that there was a seditious printer within the state in the habit of libeling the government of the United States, whom he pointed out to them as a fit subject of prosecution and that to the grand jury at Baltimore he had said that "he could not suffer them to go to their chamber without a few words on the welfare and prosperity of the country; that the course of recent congressional legislation would surely and quickly destroy all protection to property, all security to personal liberty and sink the country into a mobocracy,"—these were more serious, and on the last charge, 19 of the 34 Senators voted "yes," and the judge was only saved from conviction by the requisite of a two-thirds majority.

The one gem in the trial is the famous speech for the defense of the great Maryland advocate, Luther Martin. As has been well said, its rugged and sustained force, its strong humor, audacity and dexterity, its even flow and simple choice of language, free from rhetoric and affectation, its close and compulsive grip of the law, its good natured contempt for the obstacles put in its way, were like the forces of nature, simple, direct and fresh as the winds of the ocean, and were in startling contrast to the closing address of the leader of the prosecution, John Randolph of Roanoke.\* The arguments by which he demolished the charges against his client need not be summarized here, but the editor would call attention to the splendid statement of the duty of the advocate in the defense of a criminal:

\* John Randolph (Henry Adams), p. 147.

"I will admit, that Fries' case was such that counsel could not render him much service, but this was not the fault of the court, it was the fault of the case itself, it was because the law was clearly against him and because the evidence indisputably proved that he had committed acts which brought him within the law.

"In such cases, what is the duty of the counsel, whether assigned by the court or employed by the prisoner? It is to advise the prisoner to plead guilty and throw himself upon the mercy of his country, instead of taking up the time of the court and creating expense by a jury trial; but such advice, however agreeable to the constitution of our country, would not, I admit, agree very well with the constitution of lawyers, as thereby he might occasionally lose large fees extorted from a criminal, fed on the vain hope that the eloquence and chicanery of his lawyer might procure his acquittal, contrary to law and contrary to evidence!

"But counsel may be of service to a criminal however guilty he may be and has duties which he may correctly perform; the counsel may with propriety avail themselves of any defect in the indictment or other proceedings; they may take care that the panel of jurors are legally and impartially returned; they may direct the prisoner as to his challenges to jurors; they may take care that no incompetent witnesses are sworn, and that no improper testimony is given; they may in any questions of law, not considered settled, be heard and have the questions decided; in fine, they may take care that the prisoner has a fair trial; but when all this has been done, if agreeably to law and clear undoubted evidence, the prisoner is guilty, it is the duty of the counsel to submit his client's case to the honest decision of the jury, without any attempt to mislead them; and this, whether the counsel are appointed by the court or employed by the criminal. Thus lawyers in Maryland are in the habit of conducting themselves in such cases and thus ought lawyers, who respect themselves and have a regard for their own characters, to conduct themselves in all places."<sup>9</sup>

In other words, it is to the interest of every good citizen that a person guilty of a crime shall be punished as the law directs, and a man does not cease to be a good citizen by being called to the bar.

The petty thief *James Philips* (p. 507), who was declared innocent of any crime because the hat he was trying to steal had a string to it, was the beneficiary

<sup>9</sup> *Post*, p. 356.

of the technicalities which the humanity of English judges invented to temper the barbarities of the criminal law of the eighteenth century. A striking example of this on the part of the bench occurred in the trial of a man for stealing a horse from a stable, a capital crime at the time. The judge, unwilling to see the unhappy prisoner sent to the gallows on the next Friday, told the jury that while the unlawful taking of chattels was larceny, the unlawful taking of real estate was not; that everything attached to the soil was realty, and therefore if they should find that the horse was tied to the stable with a halter, they might acquit the prisoner, which they promptly did. Legislatures often forget that to make the penalty too severe will render even a just law not only unpopular but impotent.

The trial and execution of *Mark* and *Phillis* (p. 511) recall the trite saying of Robert G. Ingersoll that to decide whether you are a criminal or a saint you must first look at the map. And to the map he might have added the calendar, for just as what is legally right in one place is legally wrong in another, so what is a crime at one time is not against the law at another.<sup>10</sup>

<sup>10</sup> What George Washington, Henry Clay and Ulysses S. Grant regarded as a required hospitality which no gentleman would neglect, a multitude of people in the United States today consider not only criminal but actually wicked. The editor a few years ago at a social gathering heard the Chief Justice of a western state relate to a distinguished federal judge how he had that very week reversed the decision of a local judge who had convicted a man of the crime of offering a guest a glass of wine at his table. "I decided," said the Chief Justice, "that such an interference with the liberty of a citizen, a people calling themselves free, will never tolerate." "I agree with you," replied the federal judge, "but I would have put my decision on even higher ground. For I would have held that the legislature of a Christian country has no right to repeal the Golden Rule."

The history of criminal law, says Professor Wigmore, in his preface to *The History of Continental Criminal Law*,<sup>11</sup> is the history of social conditions and habits infinitely changing; and the same idea is well set out by Mr. Justice Riddell in his introduction to the same work:

"The conception of what constitutes crime varies from generation to generation. The Flagellantes of a few centuries ago were for a long time as holy as the Howling or the Whirling Dervishes; but this generation could not stand the Holy Rollers. In the ninth century B. C. a certain highly reverend person, when he was gayed by a lot of half-grown lads, turned and cursed them just as the town drunkard would today; and it was accounted to him for glory that thereupon two she-bears came out of the wood and tore the youngsters. Today the prophet would find himself in the police court for cursing, and he would be sent to the penitentiary by any people who believed in the efficacy of prayer. In some cases it may be that the change is not for the better; while no one, unless he were unusually bloodthirsty, would wish the death penalty restored for inventing and spreading satires, scurrilous stories and satirical songs of a political nature as the Twelve Tables prescribed, something better is much to be desired than the civil suit to which an ex-President of the United States was driven to defend his reputation. Perhaps the recent attempt in Philadelphia to deal with the matter had some merits. But it fell before the ridicule of the untouched. The fact is that we have lost the Middle Age sense of the importance of the word, spoken or written, and now no one would think of nailing a reviler of the city authorities to a post by the tongue until he cut himself loose.

"So, too, in the matter of punishment; death was for long the only effective deterrent; if we except what was almost as equivalent, banishment. When mankind was composed of septs, clans, tribes which looked on each other with hatred and dread and which had no inter-

<sup>11</sup> Boston: Little, Brown & Co., 1916. "Take one instance, the related crimes of robbery and larceny. Different systems and different epochs have varied widely in defining the legal scope of the Commandment. The Romans punished most rigorously open violence and were lenient with surreptitious larceny; while the early Germans strictly penalized secret theft but cared little or nothing to repress robbery. The explanation must be sought in the traditions and temper of these peoples."



course with each other, to be driven from one's own land was almost as terrible as death. Cain, made a fugitive, cried, 'My punishment is greater than I can bear,' and many felt the like when driven like the scape-goat into the wilderness. The theory grew up that the soil of the fatherland stained by the blood of the slain could not bear the presence of the red slayer. But the thought was never far absent, 'You have taken life, be therefore deprived of all that makes life worth living.' That conception of the necessity of living with one's own has long passed away; and none can convince the throngs of immigrants to this continent that banishment is a real punishment. Even the sentence of transportation lost its terrors for the 'Sympathizers,' of 1837-38, who were transported to Van Diemen's Land, and the Fenian Invaders of 1866 were sent to the penitentiary.

"Imprisonment could not be when there were no prisons; but prisons would have been built if imprisonment had been a real punishment. Until comparatively recent times the richest and most powerful lived of choice and of necessity in buildings not far removed from a gaol with thick stone walls, small windows, execrable sanitary arrangements, without provision for what we call ordinary decency. As between Sing Sing prison and Carnarvon Castle give me the prison. Only those who, like Robin Hood, lived under the greenwood tree felt it a deprivation to be shut up—the sequestration from the rest of the world bringing with it the incidental but invaluable advantage of security from enemies. When man could walk about reasonably safe from danger of sudden assault, imprisonment became something to be dreaded, and the gaol a means of punishment, so that now there is bitter complaint if *prison forte* if not *dure* be awarded even to keep an accused safe till his trial.

"We may perhaps have become too uniform in our manner of punishing different forms of offense against the law. Bentham was not oblivious to the value of making the punishment fit the crime; but he would not have gone so far as to extract the intestines from one who wrongfully girdled his neighbor's trees and wind them about the trees in lieu of the abstracted bark; nor would he give the shameless the choice between a heavy fine and running naked through the town. In Canada a few years ago the authorities had to interfere with the Doukobors, who persisted in going *in puris naturalibus*; and anyone who should now attempt anything of the kind anywhere in civilization would soon be laid by the heels."

Murder up to the last century was in all countries particularly heinous if committed by a woman against her husband, by a son against his father, or by a ser-

vant against his master. The Roman custom consisted in putting the parricide into a leather sack with a rooster, a dog, a monkey and a serpent to be thus thrown into the sea or into a river so that he might lose at the same time the sky, the air and earth. Our forefathers hanged and then exhibited in chains the male servant who killed his master, and burned at the stake the female servant, as an example to others. And the wife was similarly dealt with because she had in shedding the blood of her spouse not only committed murder, but violated her solemn obligation to love, honor and obey. But today, associated labor declares that a workman who has been convicted of murder must not be punished, or if he is hanged all workers in the country will be called on to strike, and gains its point; while as to husband slaughter in the United States, it has been held by a score of juries in the city of Chicago to be no crime, and by both courts and jurors to be a recognized civic virtue on Long Island, New York.

In high treason, other barbarities were practiced by our ancestors. After hanging, the body was to be cut down (if possible, while yet alive) to be eviscerated, then beheaded and the trunk and limbs divided into four parts to be disposed of as the sovereign should order.<sup>12</sup> All persons convicted, whether of high treason or of petit treason, were drawn to the place of execution. This was an ignominious incident of the terrible penalty and required that the criminal should be rudely pulled along over the ground behind a horse; later, however, a hurdle or wicker frame or sledge was used, either from motives of humanity or in order to prolong the punishment. Another addition to this pun-

<sup>12</sup> This sentence was pronounced by a New York court upon Colonel Bayard, convicted of treason. See 10 Am. St. Tr. 539.

ishment though not peculiar to it, since it applied to all atrocious felonies, was the gibbeting or hanging in chains. After the execution the body of a felon was taken from the gallows and hung upon a gibbet conveniently near the place where the act was committed, there to remain until from the action of the elements or the ravages of birds of prey, it disappeared. Both of these common law incidents were, it will be observed, carried out in the execution of Mark and Phillis.

The crime of *Henrietta Robinson* (p. 528) was apparently without a reasonable motive, and there have been few cases in the history of our jurisprudence wherein the plea of insanity was more ably discussed, and none perhaps which left more serious doubts upon the public mind, notwithstanding its rejection by the jury. The woman was known to the world under an assumed name, but her persistent struggle to conceal her face from public observation obtained for her the appellation of "The Veiled Murderess." The speech of Pierson, one of the counsel for the defense, is a striking illustration of Luther Martin's strictures on the criminal lawyers of the land who deem it right to sacrifice everything, even truth and honor, to save a client from conviction and punishment (*post*, p. 356). Mrs. Robinson's lawyer told the jury—doubtless honest, God-fearing citizens who held a firm belief in the inspiration and truth of the scriptures—that the Bible declared that it was better to let ninety-nine guilty men go unpunished than that one innocent man should suffer (p. 553), and did not scruple to suggest that the innocent victim might have been poisoned by his honest and hard-working wife (p. 586)—a wicked insinuation without a particle of evidence to support it.

The Whisky Insurrection in Western Pennsylv-

nia, *The Western Insurgents* (p. 620); *John Mitchell* (p. 631); *William Vigol* (p. 644), was the first serious test of the Constitution of the United States, then only six years old. The episode which was rather a series of riots than a rebellion, is of historic interest, because it presented the question of national strength under the new government—for it antedated the Fries Rebellion.

"What a bank bill was at Philadelphia or a shilling piece at Lancaster that was whisky in the towns and villages that lay along the banks of the Monongahela river. It was the money, the circulating medium of the country. A gallon of good rye whisky at every store at Pittsburg and at every farmhouse in the four counties of Washington, Westmoreland, Allegheny and Fayette was the equivalent of a shilling piece. A tax of seven cents a gallon was therefore a crushing one. The people held it to be iniquitous and every man who paid it a public enemy."<sup>13</sup>

When President Washington called on the governors of the adjoining states to furnish troops to enforce the law, Alexander Hamilton accompanied the expedition, and was indeed the soul of the whole movement. He was very anxious to display the strength of the government to teach a lesson to all who believed that it could not enforce its own laws. Yet as he afterwards said, he feared at every moment that the militia would throw down their arms and return home. The great question had been, "Will the citizens of other states march into a sister state to enforce a national law?" The army marched on, however, and on its approach, the insurgents dispersed. No blood was shed, and henceforth the excise tax was collected without difficulty. The Constitution had borne the strain, and the friends of law and order had won a victory.<sup>14</sup>

<sup>13</sup> McMaster Hist. People of the U. S., Vol. 2, p. 189.

<sup>14</sup> Elson, Hist. U. S., Vol. 2.

Our public guardians, from police officer to police judge, are as a rule supremely ignorant of art knowledge, and absolutely unable to distinguish between purity and impurity in the case of sculpture. Witness the New England Dogberry who declared that the statue of Narcissus was an object tending to "corrupt the morals of youth," and that its owner must stand trial for possessing and exhibiting a "lewd and lascivious" image. (*Charles Hazeltine*, p. 647). The jury of good men and true being equally ignorant, could not agree, and the prosecution failed. Had it succeeded, the police of a community whose public prosecutor asked the jurors in all seriousness "Can a man carve such things in wood or marble or plaster and be allowed to exhibit them in the name of art?" would, in the future, have been expected to seize all dolls without dresses and all piano legs without trousers.

The trial of *Frank James* (p. 661) illustrates in a striking way the difficulty under the constitutional and other legal limitations of our criminal procedure, of convicting a great criminal. If a man commits one crime only, it is not so hard to punish him, but let him commit a dozen or more, and the longer he is able to keep out of the meshes of the law, the safer he is. For the common law of England, from which we have taken our criminal practice with all its discarded technicalities, requires that a person shall be tried for only one crime and on the trial of that one crime it does not permit the state to prove that he is a bad man, and an individual that had better be sent to prison not only for his past misconduct, but for the public safety. The Continental courts are much wiser. There the jury is permitted to see just what kind of a man the prisoner is and what kind of life he has led.

Had James been tried in France instead of Missouri, the state would have pretty clearly proved to the jury that the prisoner was a member for years of a band of train robbers, bank robbers and murderers, who had robbed a bank at Lexington, Mo., in February, 1866; at Lexington, Mo., in October, 1866; at Savannah, Mo., in March, 1867; at Richmond, Mo., in May, 1867; at Russellville, Ky., in March, 1868; at Gallatin, Mo., in December, 1869; at Congdon, Ia., in June, 1871; at Columbus, Ky., in March, 1872, at Ste. Genevieve, Mo., in May, 1872; at Huntington, W. Va., and at Northfield, Minn., in September, 1876, killing numerous cashiers, clients and citizens; that the gang had held up railroad trains and robbed and killed express messengers, conductors and passengers at Adair, Ia., in July, 1873; at Gad's Hill, Mo., in February, 1874; at Muncie, Kan., in December, 1874; at Otterville, Mo., in July, 1876; at Glendale, Mo., in October, 1879, and at Blue Cut, Mo., in September, 1881, and that he was present at most or all of these outrages.

The elaborate scheme of *Roget* (p. 853) and his associates to defraud the insurance companies was skillfully conceived and successfully worked out, and the collection of the spoils was frustrated only by the treachery of one of the conspirators. "When thieves fall out honest men get their dues," as the old adage puts it.

The trial of *Samuel Thomson* (p. 873) should be read in connection with the trial of Francis Burke,<sup>15</sup> one of his disciples. Our criminal law has never been active in penalizing medical quacks, and the man who is fool enough to employ this species of practitioner to cure him, has only himself to blame if he kills him in-

stead. In a leading case in Missouri,<sup>16</sup> the Supreme Court laid it down that if a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine or of the nature of the disease, or both, the patient die in consequence of the treatment contrary to the expectation of the person prescribing, it is not murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm to the patient.

<sup>16</sup> Rice v. State, 8 Mo. 561.

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## THE TRIAL OF JOHN FRIES FOR TREASON, PHILADELPHIA, PENNSYLVANIA. 1799.

### THE NARRATIVE.

What has been called by historians the Fries Rebellion, after its leader, or the Hot Water Rebellion, because the women in some instances poured hot water from the windows of their houses upon the assessors, was an insurrection against the Federal government, which occurred in Pennsylvania in 1799. Congress had the year before levied a special tax upon lands, houses and slaves, and the value of each house was determined by counting the number and measuring the size of the windows. The tax was bitterly opposed in Pennsylvania, particularly in the eastern counties. Public meetings were held and resolutions adopted that the assessors should not be allowed to do their work. It was in vain that the judges and the assessors sought to explain the law. The people would not hear them and turned the court rooms into a bedlam and the tavern meetings into scenes of riot and strife. The officials were jostled, struck and called "stamplers" and rogues; Adams and the Constitution damned and Jefferson and liberty loudly cheered. When an assessor attempted to take the rates the women railed at him, set the dogs on him and threw down scalding water on his head as he attempted to measure the windows; the men threatened to shoot him in the legs. In despair the officials went back to their homes. No one was willing to go to the troubled districts alone. They determined, therefore, to send three together and begin the work of assessing at a small village near by. The farmers when they heard this were more angry than ever. In one case the militia company gathered, and, increasing as it went, set off for a town with all speed to find the assessors. But they were busy outside the town and having measured the windows of fifty houses, returned to the

tavern to dine. As they sat at dinner, John Fries\* entered the room and forbade them to go on taking the rates.

To his commands and threats, however, the assessors were deaf. They finished their dinner and went on assessing till the sun set. Then as they turned into a narrow lane to make the last measurements of the day, a great shout rose behind them. Fries and four companions were in hot pursuit. The officials escaped. But as they rode into Quakertown they found it in possession of the militia company and a mob. Two of the three assessors were taken.

While these things were going on in the county of Bucks, the United States Marshal was busy in the county of Lehigh, serving warrants and making arrests. The state courts had attempted to deal with the offenders. But the officers who bore the subpoenas were mocked and driven away. The District Attorney thereupon applied to the Federal courts, warrants were issued and on the second of March the Marshal reached Nazareth and began to make arrests. The prisoners were sent to Bethlehem.

\* John Fries was a farmer's son. He began life as a cooper's apprentice, joined the army, saw some service in the militia, went out with the troops to put down the Whisky insurrection (*post*, p. 620) and was now traveling up and down the country as a vendue-crier or auctioneer. No man in all his region was better known. The sight of him as with his dog Whisky at his feet, he stood upon the tail of a cart or the bottom of an upturned barrel ringing his bell and calling in a strange mixture of English and German for a bid on an iron spoon or an ancient lamp was familiar to the people of every town. The delight of the people was to attend vendues. To be able to call by name each one of the crowd who heard him was the delight of every vendue crier and in this Fries seems to have been most expert. Keen, shrewd, glib of tongue he held over those whose names and faces he remembered that kind of influence which comes by talk and not by deed. He was just the man to foment a riot or head a mob and he soon did both. No one was so fond as he in denouncing and misconstruing the object of the direct tax. He had sat in twenty taverns and poured out through the cloud of tobacco smoke that filled the room, arguments which to the boors who heard him seemed to be conclusive and not to be gainsaid. When, therefore, anger drove them to action they with one accord bade Fries take the lead. (McMaster Hist. People U. S., Vol. III.)

The arrests made by the Marshal set the county all aflame. The winter was over but the spring was cold, and hundreds of men who a few weeks later were busy ploughing and harrowing and sowing seed were then in idleness, haunting taverns and uttering threats against the stamplers<sup>b</sup> and the tax. Hearing what was going on in Lehigh they vowed openly that the captives should be set free. Runners were sent out. Word was passed from man to man and early in the morning of March the seventh, scores of men were on their way to the place of meeting. The rendezvous was a tavern on the Bethlehem road. Fries was quickly chosen leader and the mob, accompanied by some militia, began the march for Bethlehem. As they neared the bridge across the Lehigh, they came up with another band bent upon the same errand, joined forces and entered the town together. Some of the prisoners had been released on parole. The rest guarded by the Marshal and a small posse were shut up in a little room in the old Sun Tavern. The Marshal was commanded to set them free. The posse were warned that if they made the least resistance the town should be burned to the ground. Resistance was useless. A few moments sufficed for the rioters to mount the stairs, break open the door and bring out the prisoners.

The Government grew alarmed, summoned the rioters to disperse, ordered the militia to be in readiness and finally to march. As they entered the disaffected counties the officer in command issued an address. He explained the tax, the right of Congress under the Constitution to lay it, and told them what many of them were amazed to hear, that they had been engaged in acts of treason and rebellion. Then the arrests began. Parties on foot and horse scoured the country in search of every man who by withstanding the assessors or joining in the march to Bethlehem had made himself conspicuous in the revolt.

Fries was the man most sought and when found was mounted on a barrel with a bell in one hand and an article

<sup>b</sup> See *post*, p. 17.

of household furniture in another holding vendue. So intent was he on his business and the crowd upon his jest and wit that the troops were upon him before their approach was known. At the first cry of "The Soldiers, the Soldiers," Fries leaped to the ground, fled away on foot to a neighboring swamp and crouched down in the briers.<sup>c</sup> He was captured and taken to Philadelphia where he was indicted, tried and convicted of treason. But it was discovered that one of the jury was prejudiced and before the trial had more than once publicly declared that he ought to be hung. The Court, therefore, set the verdict aside and ordered him to be tried again.

### THE TRIAL.<sup>1</sup>

*In the United States Circuit Court, Philadelphia, Pennsylvania, April, 1799.*

HON. JAMES IREDELL,<sup>2</sup>  
HON. RICHARD PETERS,<sup>3</sup> } *Judges.*

*April 30.*

The grand jury having, on April 11, been charged at length by Mr. JUSTICE IREDELL on the law of treason and the late disturbances and resistance to the law in Northampton and other counties, the

<sup>1</sup> *Bibliography.* \*"The Two Trials of John Fries on an Indictment for Treason; together with a brief report of the trials of several other persons, for Treason and Insurrection, in the Counties of Bucks, Northampton and Montgomery, in the Circuit Court of the United States, begun at the City of Philadelphia, April 11, 1799; continued at Norristown, October 11, 1799; and concluded at Philadelphia, April 11, 1800; before the Hon. Judges Iredell, Peters, Washington and Chase. To which is added, a copious Appendix, containing the evidence and arguments of the counsel on both sides, on the motion for a new trial; the arguments on the motion for removing the case to the county where the crime was committed, and the argument against holding the jurisdiction at Norristown. Taken in shorthand by Thomas Carpenter. (Copyright secured.) Philadelphia: Printed and sold by William W. Woodward, No. 17 Chestnut, near Front Street. 1800."

Wharton's State Trials, see 4 Am. St. Tr. 616.

<sup>c</sup> From McMaster Hist. People U. S., Vol. III.

<sup>2</sup> See 4 Am. St. Tr. 616.

<sup>3</sup> See 4 Am. St. Tr. 616.

grand jury on this day returned an indictment against *John Fries* for the crime of high treason.\*

The *Prisoner* having been set to the bar, pleaded *not guilty*.

The petit jury impanelled, consisted of the following: William Jolly, Samuel Mitchell, Richard Leedom, Anthony Cuthbert, Alexander Fullerton, John Singer, William Ramsay, Samuel Richards, Gerardus Wynkoop, Joseph Thornton, Philip Walter, John Rhoad.

Some difficulties arose as to the two latter being qualified, they

\*The Grand Inquest of the United States of America, for the Pennsylvania district, upon their respective oaths and affirmations, do present that John Fries, late of the county of Bucks, in the district of Pennsylvania, he being an inhabitant of, and residing within the said United States, to-wit, in the district aforesaid, and under the protection of the laws of the said United States, and owing allegiance and fidelity to the same United States, not having the fear of God before his eyes, nor weighing the duty of his said allegiance and fidelity, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquility of the said United States to disturb, on the seventh day of March, in the year of our Lord one thousand seven hundred and ninety-nine at Bethlehem, in the county of Northampton, in the district aforesaid, unlawfully, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States; and to fulfill and bring to effect the said traitorous compassings, imaginations and intentions of him the said John Fries, he, the said John Fries, afterwards, that is to say, on the said seventh day of March in the said year of our Lord one thousand seven hundred and ninety-nine, at the said county of Northampton in the district aforesaid, with a great multitude of persons, whose names at present are unknown to the Grand Inquest aforesaid, to a great number, to-wit, to the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, clubs, staves and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States, and then and there, with force and arms, in pursuance of such their traitorous intentions and purposes aforesaid, he, the said John Fries, with the said persons so as aforesaid traitorously assembled, and armed and arrayed in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy public war against the said United States, contrary to the duty of his said allegiance and fidelity, against the Constitution, peace and dignity of the said United States, and also against the form of the act of the Congress of the said United States, in such case made and provided.

being Germans, and not sufficiently understanding the English language: however, it was agreed that any difficulties of that nature might be explained to them, and it was urged that they would understand many of the witnesses better than others, several of those being Germans also, and could not speak English, on which account an interpreter was sworn.

*William Rawle*<sup>5</sup> and *Samuel Sitgreaves*,<sup>6</sup> for the Government.

*William Lewis*,<sup>7</sup> *Mr. Ewing* and *Andrew J. Dallas*,<sup>8</sup> for the Prisoner.

*Mr. Lewis* moved that the trial may not proceed on here, but may be had in the county in which the acts of treason in the indictment are laid and where the offense therein mentioned is alleged to have been committed.

JUDGE IREDELL denied the motion.

#### MR. SITGREAVES' OPENING SPEECH.

*Mr. Sitgreaves.* Gentlemen of the Jury: By the indictment which has been just read to you, you perceive that John Fries, the prisoner at the bar, has put himself on trial before you, on an accusation of having committed the greatest offense which can be perpetrated in this, or any other country, and it will devolve on you to determine, according to the evi-

<sup>5</sup> See 4 Am. St. Tr. 624.

<sup>6</sup> SITGREAVES, SAMUEL. (1764-1827.) Born Philadelphia, Pa.; M. A. Univ. of Penn., 1780; studied law under James Wilson, one of the signers of the Declaration of Independence; admitted to bar (Philadelphia), 1783; settled in Easton, Pa., 1786; member of State Constitutional Convention, 1789-1790; member U. S. Congress, 1795-1798; conducted impeachment of William Blount, 1797; commissioner to settle claims under Jay Treaty; retired from politics, 1802, and resumed practice at Easton; founder of Easton (now Carnegie) Library, also of Easton Bible Society and of Trinity Protestant Episcopal Church at Easton; charter trustee of Lafayette College (Pennsylvania), 1826-1827; president Easton Bank, 1815-1817; first town clerk of Easton; died Easton, Pa. See Appleton's Cyc. Am. Biog., 1915; Biog. Cong. Direct. (1774-1911), 1913; Lamb's Biog. Dict., 1900; Univ. Penn. Biog. Cat., 1894; Condit (U. W.) History of Easton, Pa. (1739-1885), 1885.

<sup>7</sup> LEWIS, WILLIAM. (1751-1819.) Born Chester County, Pennsylvania; admitted to bar, 1773; member Pennsylvania Legislature, 1780; Judge U. S. Dist. Ct., 1792.

<sup>8</sup> See 7 Am. St. Tr. 679.

dence which will be produced to you, on the important question of life or death. It is the duty of those that prosecute, to open to you, as clearly as they are able, those principles of law which apply to the offender, and then to state to you the testimony with which the accusation is supported. This duty has devolved upon me, and I hope, while I regard my duty as accuser, I shall do it in such a way as shall do no injustice to the prisoner. However, if I should be incorrect, there are sufficient opportunities for me to be corrected by the vigilance which the counsel engaged on behalf of the prisoner will use, and the order which the court will observe. These are sufficient to correct any mis-statements, but I will use my utmost endeavors to be guilty of none.

The prisoner is indicted of the crime of treason. Treason is defined in the Constitution of the United States, Section 3, Art. 3, in the words following: "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

This crime appears to be limited to two descriptions: the one, levying war against the United States, and the other adhering to its enemies. With respect to the latter branch of the description, there will be no occasion for any explanation, or to call your attention in the least to it, because it is not charged upon the prisoner; he is charged with having committed treason in levying war.

This expression, phraseology, or description as adopted by our Constitution, is borrowed from a statute of Great Britain, passed in the reign of Edward III, which has, ever since it passed, commanded the veneration and respect of that nation, almost equal with their great charter: it is considered as a great security to their liberties. Indeed the uniform and unanimous consent given to this statute, through a great lapse of time, by the most able writers on law; its never having undergone the least alteration amidst the most severe scrutinies, and its adoption into the Constitution of the United States, without the least amendment, are sufficient encomiums to prove its worth. I shall state to you, as far as is nec-



essary to the present application of that statute, the most able and judicious expositions, but without recurring to a variety of authorities which might be quoted.

. The crime of treason, as it has been laid down by those writers, generally allowed to be the most able on law, whose accuracy is unquestionable, is the highest crime that can possibly be committed against the good government of a nation, and a considerable inroad into the liberties of a subject. In discussing this crime, I shall only recur to the notes which I have taken, and my own knowledge of the law; if that statement should be inaccurate, there are sufficient opportunities for amendment in the course of this trial. Treason consists in levying war against the government of the United States: it may confidently be said not only to consist in joining or aiding the hostile intentions of a foreign enemy; nor is it confined to rebellion in the broad sense in which that word is generally understood; or in the utter subversion of the government and its fundamental institutions: but it also consists in the raising a military force from among the people for the purpose of attaining any object with a design of opposing the lawful authority of the government by dint of arms, in some matter of public concern in which the insurgents have no particular interest distinct from the rest of the community. This is the best description of the crime of treason, as it relates to the matter before you, which I am able to give. A tumultuously raising the people with force, for the purpose of subverting, or opposing the lawful authority of the government, in which those insurgents have no particular interest distinct from the people at large.

Agreeably to the division made in the definition of treason by Lord Hale, it must consist both in levying war, and in levying war against the government of the United States. Respecting levying of war, it is to be understood, agreeably to the most approved authorities, that there must be an actual military array. I mention this because I think it proper to be particular in so essential and important an inquiry, and because I think we shall prove to you that this was actually done by the prisoner. Another thing I wish you

to bear in mind is, that war may be sufficiently levied against the United States, although no violence be used, and although no battle be fought. It is not necessary that actual violence should take place, to prove the actual waging of war. If the arrangements are made, the numbers of armed men actually appear, so as to procure the object which they have in view by intimidation, as well as by actual force, that will constitute the offense.

It must be war waged against the United States. This is an important distinction. A large assemblage of people may come together; in whatever numbers; however they may be armed or arrayed, or whatever degree of violence they may commit, yet that alone would not constitute treason; the treason must be known; it must be for a public and not a private revenge: it must be avowedly levying war against the United States; if people assemble in this hostile manner only to gratify revenge, or any other purpose independent of war against the United States, it will only amount to a riot; but if it is an object in which the person has no particular interest, this constitutes the offense of treason. There are a variety of instances which might be produced in order to illustrate this definition of the law, but it is not necessary to turn to them. Suffice it to say that it is the intention or end for which an insurrection is raised, which constitutes the crime. This, of course, you will have in mind when the testimony is gone into. I will just observe, as applicable to this case, that one instance which is defined, of the crime of treason, is, to defeat the operation of the laws of the government; any insurrection, I will be bold to say, to defeat the execution of the public laws, amounts to treason. Having given you this explanation of treason, so far as I suppose it is connected with the present awful occasion, I shall now proceed to state the amount of evidence we mean to produce, in order to prove that the unhappy prisoner was guilty of that high crime.

It will appear, gentlemen, from the testimony which will be presented to you, that, during the latter months of the year 1798, discords prevailed to an enormous extent throughout a large portion of the counties of Bucks, Northampton

and Montgomery, and that considerable difficulties attended the assessors for the direct tax in the execution of the duties of their assessment. It is not in the nature of this inquiry to explain for what purpose, or by what means, the opposition was made: it is not necessary to say whether the complaints urged were well or ill founded, because it is a settled point that any insurrection for removing public grievances, whether the complaints be real or pretended, amounts to treason, because it is not the mode pointed out by law for obtaining redress. It will then be sufficient to show you that discontents did exist, and that in various townships of those counties: that in several townships, associations of the people were actually formed, in order to prevent the persons charged with the execution of those laws of the United States from performing their duty upon them, and more particularly to prevent the assessors from measuring their houses: this opposition was made at many public township meetings called for the purpose; in many instances resolutions were entered into, and reduced to writing, solemnly forewarning the officers whose duty it was to execute the laws, and these, many times accompanied with threats if they should perform that duty. Not only so, but discontents prevailed to such an height, that even the friends of the government in that part were completely suppressed by menaces against any who should assist those officers in their duty. Repeated declarations were made, both at public, as well as at private meetings, that if any person should be arrested by the civil authority, such arrests would be followed by the rising of the people, in opposition to that authority, for the purpose of rescuing such arrested prisoners. It will appear to you farther, gentlemen, in the course of evidence, that during those discontents, indefatigable pains were taken by those who were charged with the execution of the laws, to calm the fears, and to remove the misapprehensions of the infatuated people; for this purpose, they read and explained the law to them, and informed them that they were misled into the idea that the law was not in force, for that it actually was; at the same time warning them of the consequences which would

flow from opposition; and this was accompanied with promises that even their most capricious wishes would be gratified on their obedience. The favor was in many instances granted, that where any opposition was made to any certain person executing the office of assessor, in some townships proposals were made for the people to choose for themselves, but notwithstanding this accommodating offer, the opposition continued.

After having shown to you the general extent of this combination and dangerous conspiracy, which existed in all the latitude I have opened to your view, we shall next give in evidence full proof that the consequences were actual opposition and resistance: in some parts, violence was actually used, and the assessors were taken and imprisoned by armed parties; and in others, mobs assembled to compel them, either to deliver up their papers, or to resign their commissions; that in some instances they were threatened with bodily harm, so that in those parts, the obnoxious law did remain unexecuted in consequence of this alarm. Seeing that the state of insurrection and rebellion had arisen to such a height, it became necessary, in order to support the dignity, and indeed the very existence of the government, that some means should be adopted to compel the execution of those laws; and warrants were in consequence issued against certain persons who had so opposed the laws: these processes being put into the hands of the marshal of the district, were served upon some of them: in some instances, during the execution of that duty, the marshal met with insult, and almost with violence: having, however, got nearly the whole of the warrants served, he appointed headquarters for these prisoners to rendezvous at Bethlehem, where some of them were to enter bail for their appearance in the city, and others were to come to the city in custody, for trial. It will appear to you, that, on the day thus appointed for the prisoners to meet, and when a number of them had actually assembled agreeably to appointment, a number—parties in arms, both horse and foot, more than an hundred men, accoutred with all their military apparatus, commanded in some instances by their proper of-

ficers—marched to Bethlehem, collected before the house in which were the marshal and prisoners, whom they demanded to be delivered up to them, and in consequence of refusal, they proceeded to act very little short of actual hostility, so that the marshal deemed it prudent to accede to their demands, and the prisoners were liberated.

This, gentlemen, is the general history of the insurrection. I shall now state to you the part which the unfortunate prisoner at the bar took in those hostile transactions. It will appear that the prisoner is an inhabitant of the township of Lower Milford, in the County of Bucks; that some time in February last, a public meeting was held at the house of one John Kline in that township, to consider, in relation to this house tax, what was to be done; that at that meeting certain resolutions were entered into, and a paper signed; (we have endeavored to trace this paper, so as to produce it to the court and jury, but have failed); this paper was signed by fifty-two persons, and committed to the hands of one of their number: John Fries was present at this meeting, and assisted in drawing up the paper, at which time his expressions against this law were extremely violent, and he threatened to shoot one of the assessors, Mr. Foulke, through the legs, if he did proceed to assess the houses. Again, the prisoner, at a vendue, threatened another of the assessors, Mr. S. Clarke, that, if he attempted to go on with the assessments, he should be committed to an old stable, and there fed on rotten corn: we shall further prove that, upon its being intimated by some of them to Mr. Chapman, principal assessor, that if they might choose their own assessors, things would go on quietly, he directed that they should do so; but still they continued in opposition to the law, and would not choose an officer at all. A general meeting was called to read and explain the law to the people, and thus remove any wrong impressions and misapprehensions: the principal assessor was at that meeting; but the rudeness, opposition and violence, used by the people, prevented him from doing so, which was an evident proof that they did not want to hear the law, and that they understood enough of it to oppose it: thus the benevo-

lent intentions of that meeting were frustrated. We shall farther show you that the assessor of Lower Milford was intimidated so as to decline making the assessments, and that the principal assessor, together with three other assessors, was obliged to go into that township to execute the law; that they proceeded in the execution of their duty during a part of the day of the 5th of March last, without any impediment; that, at 11 o'clock in the morning, Mr. Chapman met, at the house of Jacob Fries in Lower Milford, with the prisoner, when he, the prisoner, declared his determination not to submit, but to oppose the law, and that by the next morning he could raise 700 men in opposition to it: that, upon Mr. Chapman telling him that many houses were assessed, the prisoner flew into a violent passion, absolutely declaring that it should soon be in this country as it was in France. We shall farther show you that, at another time during the same day, the prisoner met with two of the assessors, Mr. Rodrick and Mr. Foulke, whom he warned not to proceed in the execution of their duty, accompanied with threats that if they did, they would be hurt; and left them in a great rage. Farther, he proceeded to collect parties, with whom he went in search of those men, and attacked them in executing their duty; one of them escaped, but the other he took; but not having got Mr. Rodrick, who appeared to be a particular object of resentment, he let Mr. Foulke go, telling him he would have them again the next day. He told Mr. Clarke that if he had met with Mr. Rodrick, he would not have left him go so easy, and declared to him solemnly and repeatedly, that it was his determination to oppose the laws. We shall farther show you that, after having discharged Foulke, he proceeded to collect a large party in the township, in order to take the assessors the next day. Accordingly, on the day following, a numerous party—to-wit, about fifty or sixty, the greatest part of whom were in arms, collected together, and pursued the assessors, and not finding them in that township, pursued them into another, in order, not only to chase them out of the township, but generally to prevent them executing their duty. This party collected, not only many of them in arms, but in

military array, with drum and fife, and commanded by this Captain Fries and one Kuyder: Fries himself was armed with a large horse pistol. Thus equipped, they went to Quaker Town, in order to accomplish their purpose, where they found the assessors, two of whom they took, but Rodrick fled. Fries ordered his men to fire at the man who fled, and a piece was snapped, but did not go off. Fries did then compel Foulke to deliver up to them his papers, but not finding them what they expected, they were returned; but at the same time exacting a promise that he, the assessor, should not proceed in the valuation of the houses in Lower Milford. Fries was in many instances extremely violent against this law, and peremptory in his determination not to submit to it, as will appear by the evidence.

When they left Quaker Town, they met with a traveling man who expressed some good will towards the government, and for that expression they maltreated him very much, and expressed their general dislike to all who supported the same principles. During the time they were at Quaker Town, intimation was received that the marshal had taken a number of persons prisoners in consequence of opposing the execution of this law, whereupon a determination was formed among these people to go and effect their rescue; and the people of Milford were generally invited to assist in this business. When they were going, the party halted at the house of John Fries, and then a paper was signed, by which they bound themselves volunteers to go upon the execution of this design. This paper was written by the prisoner at the bar, and signed by him and the rest; therein they engaged to go and rescue the prisoners who had been arrested by the marshal. On the morning of the next day, twenty or more of them met at the house of Conrad Marks, in arms, to go on with their design. John Fries was armed with a sword, and had a feather in his hat. On the road, as they went forward, they were met by young Marks, who told them that they might as well turn about, for that the Northampton people were strong enough to do the business without those from Bucks County. Some were inclined to do; but at the in-

stance of Fries and some others, they did go forward, and actually proceeded to Bethlehem. Before the arrival of these troops, a party, going on the same business, had stopped at the bridge, a small distance from Bethlehem, where they had been met by a deputation from the marshal, whom he had prevailed on to go and meet them, in order to advise them to return home. They agreed to halt there, and send three of their number to declare to the marshal what was their demand. It was during this period that Fries and his party came up; but it appears that when they came, Fries took the party actually over the bridge, and that he arranged the toll with the man, and ordered them to proceed. With respect to proof of the proceedings at Bethlehem, it cannot be mistaken; he was there the leading man, and he appears to enjoy the command. With the consent of his people, he demanded the prisoners of the marshal; and when that officer told him that he could not surrender them, except they were taken from him by force, and produced his warrant for taking them, the prisoner then harangued his party out of the house, and explained to them the necessity of using force. And that you should not mistake his design, we will prove to you that he declared, "that was the third day which he had been out on this expedition; that he had had a skirmish the day before, and if the prisoners were not released, he should have another that day. Now, you observe," resumed he, "that force is necessary, but you must obey my orders; we will not go without taking the prisoners; but take my orders, you must not fire first; must be first fired upon; and when I am gone, then you must do as well as you can, as I expect to be the first man that falls." He further declared to the marshal, that they "would fire till a cloud of smoke prevented them seeing one another." And, executing the office of commander of the troops, which at that time overawed the marshal and his attendants, he harangued the troops to obey his orders, which they accordingly did, and the marshal was really intimidated to liberate the prisoners; and then the object was accomplished, and the party dispersed, amidst the huzzas of the insurgents. After this affair at Bethlehem,



it will be given you in evidence, that the prisoner frequently avowed his opposition to the laws, and justified that outrage; and, when a meeting was afterwards held at Lower Milford to choose assessors, the prisoner refused his assent to the accommodating object of the meeting, and appeared as violent as ever.

These are some of the points we mean to prove before you. I shall, therefore, at present, proceed to introduce our testimony.

### THE WITNESSES FOR THE PROSECUTION.

*William Henry.* Arrived at Bethlehem the evening of March 6, 1799; had heard of a party of men to rescue prisoners here in custody of the marshal; went to assist the marshal, and prevail on the people to desist; was one of the Judges of Common Pleas for Northampton. About 10 next morning two men, with arms, arrived at the tavern where we were; after first saying they came upon a shooting frolic, one of them said they were come to see what was best to be done for the country. After that, several others came, armed and on horseback, two in uniform, with swords and pistols. A considerable number of people had assembled. We requested them to withdraw, and not appear in arms to obstruct the process of the United States laws. They answered, they were freemen, and might go where they pleased with their arms; told them they ran great risk by appearing in arms for such a purpose; requested them to deliver up their arms; but they refused. Told one of them it would be best for him to surrender and not oppose the process; they gave answer, that they

had come to accompany their friend, and to see that no injury was done to him. By this time there were a number more collected, mostly armed. Three men, a deputation from the armed body, made inquiry as to the intention of the marshal in taking prisoners. The marshal reasoned with them as to the consequences of opposition, or threats, or preventing him from executing his duty; he liberated two men that were first put in confinement, and returned them their guns, which were loaded; informed them of the badness of their conduct, and the consequence of it; it had no effect. About 1 first saw the main body of this armed force, marching up the street. A party of horse, came riding two abreast; then followed the foot, marching single file; they marched twice round the tavern, and placed themselves in front of the house; they were riflemen; they continued there till the rescue was effected; frequently heard the prisoners demanded.

*Cross-examined.* Heard in the house that this demand had been made; also that they intended to force their passage up stairs; ob-

served coming up stairs one, whom I did not know, pointing a rifle up the stairs, as though levelling it at some person. Heard the cry of "deliver up the prisoners," from the party at the foot of the stairs. An old man came running in from the front door, and called for Captain Fries in German, telling him there was his sword (offering it); observed prisoner wave his hand and tell him to wait, it was not quite time yet; shortly after the prisoners were given up.

Fries was going backward and forward among the men, as though in command; saw him marching into the town in front of the footmen. After the prisoners were delivered up, the principal part of the men marched off. They did not take the prisoners with them. In the lower room, a man declared very violently; if the damned stampers\* had only fired a shot, we would have showed what we could do; the words were in German. There were twelve or fourteen of the horse in a military dress, as well as armed; they had shot pouches, all who had guns. Did not count the number, there appeared about an hundred, not less than four hundred were in the crowd. The marshal had with him for his posse fourteen or fifteen. There were eighteen or nineteen prisoners; understood releasing the prisoners was their object.

*William Barnett.* Was summoned on March 7 at Bethlehem, as one of the posse. There were some men coming with arms: the

marshal appointed four of us to meet them, to prevail upon them not to come into town; about a mile from Bethlehem met a party of horsemen armed; did not know any of them, understood they were from Northampton County. We asked for their commanding officer; said they had no officers; they were all commanders. We told them what our errand was, but they did not seem to mind much. A company of riflemen came up, armed. We asked them what they wanted by going into Bethlehem with arms. They said the marshal had two of their men and they would have those two men set at liberty; asked them if they would not allow that if any had done wrong, they ought to suffer for it: They agreed, but they should not be taken to Philadelphia, but have their trial in Northampton County. We agreed that they send two or three men over to the marshal, and not go bodily; promised them that we would see them safely returned. We all went over together to the tavern at Bethlehem, where the marshal was; he gave the two men up to them. We went back with them to where we had left the remainder of the men. Met a party of horsemen, all had swords or some arms. We told them that they had better go back, and not go up into the town; they seemed very anxious to go up. One of them said: "This is the third day that I was out, I had a fight yesterday, and I mean to have another today if they do not let the prisoners clear." Prisoner was the man

\*A Stampler was explained to be a nick-name given in that country to the friends of government, originating from their support of the stamp act.

who said so; never saw the man before. He had a sword; others who had come up during the time we were gone. I know that the two persons they had demanded were liberated. The horsemen did not wait, but hurried on: they marched up town, and formed right in front of the tavern; talked with them a great deal, but could not do any thing with them; they would have the prisoners, all of them. This man, whom they called Captain Fries, came out and mentioned to his men that he would now have the prisoners, if any of them would go into the house with him: he had been in backward and forward several times. He said he should go foremost; that they were none of them to fire first, if they went in; that there were some armed men on the stairs belonging to the marshal. I saw the men going in at the door and followed them; did not see the prisoner after. Saw the prisoners coming down stairs.

Captain Fries said, when he told the men to come forward, that if he did get it, they should not be scared; they must do as well as they could; he expected to get some stroke; they must take care of themselves; do not recollect he said they should shoot, he said, I think, "slay, strike, or do as well as you can."

The crowd dispersed immediately on the release of the prisoners.

*John Barnett.* On March 7 I aided the marshal in executing the laws; I arrived at Bethlehem, when somebody came in, and said he had met men walking towards a tavern, on the road, about three or four miles from Bethlehem. The marshal thought it

best to send three or four men to stop them—John Mohollan and William Barnett, but Isaac Hattsel went, two Federalists and two anti-Federalists. They went and met them; I remained at the house; just as they were getting upon their horses two men came with arms; the marshal talked to them, took their arms away from them and carried them up stairs. Directly after five or six horsemen came. The marshal and Judge Henry asked them what they came there for: they said, they only came there to be Shankwyler's bail; Judge Henry asked them what they did with their arms? They said they did not mean any harm with them. They got off their horses, and went into a room with the judge and the marshal. Presently after, there came up a troop of horse, and behind two companies of riflemen. They formed before the door of the tavern. There were about fifty riflemen, and the light-horse had their swords drawn. There were one hundred and forty armed men, and about sixteen of the marshal's posse.

After they had formed a line in the yard Captain Jarret arrived, when they gave three huzzas. The marshal requested him to get the men to withdraw. He professed he would. The men kept regular order and never separated. The marshal appointed four of us to keep the guard of the stairs. Fries, the prisoner, came up and wanted to go up stairs; he wanted to see the marshal. Fries then went up and told the marshal he was come for the release of the prisoners. The marshal said he could not give them up; he then told the marshal he would have

them. Well, said the marshal, you must get them as well as you can; it was out of his power to deliver them up; he dared not do it. Fries said he had a skirmish yesterday, and he expected to have another one today; "As for you, marshal, I will vouch that none of my men will hurt you, but as for the other company, I will not."

He returned with those armed men. He had a sword in his hand, I think it was in its scabbard. Heard them say they would not leave the ground till they had the prisoners. Before the prisoners were released, I was relieved. When they made the second attempt I was up stairs looking out of the window. About sixteen or eighteen prisoners were there; believe there was not any kind of acquaintance or friendship between Fries and any of the prisoners. The prisoners said they did not wish to be rescued by those people; they knew none of those people that were before the door. If they had done anything wrong, they said they were willing to go anywhere to take their trials. The minister, and the Lehigh people were all there.

*Cross-examined.* Saw them point their guns towards the window often enough. No violence offered to any person, besides what was offered to the marshal.

*Christian Winters.* Was summoned March 7th to go up to Bethlehem; went accordingly; when I came there—about the middle of the day—the first man that I saw come there armed was Keiser; another, think his name was Paul, came with him to the tavern; the marshal went out

and brought them into the house and took them up stairs; was set to stand guard by them.

*Christian Ruth.* On 7th of March was summoned to go to Bethlehem. About 11 o'clock got to Bethlehem; Mr. Eyerly told me some men were coming there to rescue the prisoners; after about three hours there came two men on horseback, and had their arms. Mr. Marshal, myself and Mr. Philip Sheitz asked them what they were about. They told us they were informed there were a number of men met there today, so they said they came there to see how they came on; did not say what they heard they were to meet for. We took them and put them into the house under guard, and took their arms from them. I, Judge Mohollan, Major Barnett, and —, went out and met the party within a mile of Bethlehem; did not know a single man of them; Judge Mohollan and Major Barnett spoke to them first; I said to them, "What in the world are you about, men? you will bring yourselves into great trouble." "If you do not do as I advise you, you will be sorry for twenty years after this;" one of them leveled his gun at me: said I, "Little man, consider what you are about; don't be too much in a hurry;" then some of his comrades pushed him back. Then that man halloed out, "March on; don't mind this, people;" do not know his name. They marched on to the bridge, and we stopped them again. They then agreed they would send three men with us to the marshal, to see if they could get the two prisoners we took at first liberated, and gave their honor that none of them

should come over the bridge with arms. We went with these three men to the tavern at Bethlehem. They went to the marshal, and agreed with him, and the two prisoners were discharged. When these two men were discharged, we went to go back with them again; but when we came to the lower end of Bethlehem, there was that company and another coming on, and there was no stopping them again. The men paraded before the tavern for two hours. They had not their swords drawn till they came near to the tavern; then they drew their swords, a great number of them. They told us that they were informed that they had taken a number of prisoners, and that they would take them to Philadelphia, and put them in jail there, and no bail would be taken for them. We asked them what prisoners they meant. They mentioned one name only that I recollect, which was one Shankwyler. They mentioned they would not suffer Shankwyler to be put to jail in Philadelphia; they would give bail ten double for him, or that they might put him in jail in our own county, and try him in our own county. Saw one Schwartz come up into the room where the marshal was. No one abused, threatened, or insulted Mr. Eyerly that I know of; heard no threats against any one.

*Colonel Nichols.* Am the marshal; the warrants I hold in my hand were given to me with orders to go to Northampton County to execute them. I got to Nazareth on March 1; next morning, Mr. Eyerly and myself went into Lehigh township to serve warrants upon persons

who had given their opposition to the house-tax law. We met with no difficulty till we went to the house of George Syder; had a subpoena on him; he and his wife insulted us very much; his wife began abusing us first, and he came out with a club, and would not be persuaded to receive it. At Millarstown went to the house of George Shaeffer, to serve a warrant on him, but he was not in town; returned to the tavern and saw a number of people assembled. Mr. Eyerly and myself walked over to Shankwyler; many people ran after us, and many ran past us, and getting into the house, filled the long room. Near the house Shankwyler lived, concluded it was bad policy to ask for him; as Col. Balliott knew him, got him to point him out to me; observing me, he withdrew into the crowd; I followed and laid hold on him and told him he was my prisoner, in the name of the United States. He retreated towards his barn; called out that he would not hurt the marshal, but Eyerly and Balliott were damned rascals; after this the people called out to each other Schlaget! schlaget! (strike! strike!) This seemed to be the general voice of the people. David Shaeffer seemed to be a prominent character.

Told them I had a pair of pistols; I pulled open my great coat, that I might, if necessary, get a ready gripe at them; they were then a little quiet; they, however, pulled the cockade out of Mr. Balliott's hat, and I believe would have done more violence to him, had they dared; called on Shankwyler to go with me to Bethlehem, and thence to

Philadelphia; he swore he would not submit, be the consequence what it might; told him it would ruin his interest and family; he said he would do it, if it was to the destruction of his property, and children; he finally agreed to meet me at Bethlehem, but never promised to surrender as prisoner. He spoke a good deal about the stamp act, and the house tax; that seemed to be the bone of contention; said he had fought against it, and would not submit to it now; there were none in favor of those laws but Tories, and officers of government; told him that, as to Tory, that could not apply to me; I had had a share in the Revolution; I was as fond of liberty as any of them. They huzzaed for liberty; told them that I should join them in that, if they would huzza for liberty of the right kind; but this was licentious liberty. I was informed that the rescue of the prisoners at Bethlehem was intended. This was on March 6th; we got to Bethlehem that night; were informed the report was serious, and that it would be attempted by a body of armed men. I consulted with Judge Henry, Mr. Balliott, Mr. Eyerly, Mr. Horsefield, and General Brown. I then consulted an attorney, told him I was ordered to call a *posse comitatus* in case of necessity, and also that I was ordered that they should not be an armed force; spoke to Judge Henry, expecting that he could call out armed men, but he told me he could not, for he had received similar instructions. We concluded to call about twenty men—about eighteen came in. About 10 or 11 two men rode into the yard; one had a long

smooth bore gun and the other a rifle. Asked them what brought them there: they seemed to be at a loss for an answer; one of them said they came out on a shooting frolic; asked them what they meant to shoot: they did not know, nor could they explain the object of their coming; asked them what they meant to do: one of them said they meant to do what was best for the country. Led them into the house and put their arms into the garret. Shortly after three horsemen, armed and in uniform, came into the yard with Shankwyler; asked Shankwyler if he was come to deliver himself up, he answered no. The people were collecting very fast, and some persons mentioned that there was an armed force down by the bridge. A few men were sent to speak to them, and warn them of the danger they were in, if they persisted; in a little time they returned with three of their force, as a deputation to speak to me; they said they wanted to prevent my taking the prisoners to Philadelphia; told them they had much better go back, and tell the people to go to their respective homes. I gave them up then, and their guns were given up to them. A short time afterward we observed that they were coming up in force, up the street, Mr. Mohollan riding with the foremost of them, and speaking to them: the horsemen, such as had swords, had them drawn: the infantry marched with trailed arms. The prisoner was at the head of the infantry, with his sword drawn. They were all strangers to me; told them the consequences of their attempting to rescue the prisoners; that

things of this kind would be severely punished by the government; that it would be considered a high offense, and that every insult offered to me, would be an insult to the United States. Had a good deal of conversation with prisoner at the bar, without knowing that he was Captain Fries, till he made himself known to me; remonstrated strongly against the measures, told them the consequence, but they seemed regardless of it, and seemed determined that I should give them up.

During this conversation, he was without his sword; he demanded of me the prisoners; I refused to give them up, and told him the consequences of his demands; that he and those about him would be severely punished for this conduct, that he would surely be hanged. He said they could not be punished; that the government were not strong enough to hang him, for that if the troops were brought out, they would join him.

His reason was, that he was opposed to those laws—the alien law, the stamp act, and the house-tax law; and said they were unconstitutional. He also spoke of bringing people charged with crimes to Philadelphia to be tried as an oppressive thing; they had no objection, he said, to be tried in their own courts, and by their own people. Told him I was commanded to bring him to Philadelphia; he insisted upon having them. He then went and talked to his people, and came to me again. He told me that if I did not give them up, he would not answer for the consequences; that he would not hurt me; he

was the oldest captain in the rank, but he would not answer for them that were with me. Captain Jarrett came in and there was much noise and huzzing. I was told that this noise was on account of the arrival of Captain Jarrett; he had a pair of pistols in his hand. He showed me that he had entered into recognizance for his appearance; begged him to use his influence in persuading the people to disperse, and go to their respective homes, and told him what would be the consequence if they did not. His answer was that he had no influence; that he could do nothing. I consulted with Judge Henry and others, what was best to be done; it seemed to be their opinion that I had better submit, and give up the prisoners; told them I would not do it; would immediately march the prisoners to Philadelphia, and if the armed mob thought proper to take them from me, they might; it would then be their act, and not mine; I went to them and told them to prepare for march immediately, for that we would set off to Philadelphia. The Lehigh prisoners said they would not do so, they would not expose themselves to so much danger; but if I would suffer them to go to their homes, they would meet me in Philadelphia on the Monday or Tuesday following. Met Mr. Fries about the foot of the stairs, he still persisted in his demand of the prisoners, that I must give them up.

*Cross-examined.* Do not think he had a sword at that moment. A person I did not know told me that if I did not give them up, I should not be hurt, but the lives

of Balliott, Eyerly and Henry were in danger. Did not like to expose the lives of those men, so I gave up the prisoners. Fries came in directly, and said I had not given up Ireman, the minister; told him I had. He then mounted and went off. Did apprehend that the lives of those gentlemen would be in danger if I refused the prisoners.

*Philip Schlaugh.* At Bethlehem, March 7th, the first I saw was Fries in the entry of the house, where he was speaking loud. Inquired who that was; they said it was Captain Fries. He said they who were the greatest Tories in the last war, were the head leaders now; he went up to the marshal, and when he came out again, he went up to his company, and told them, "Well, brothers, I went up to the marshal, and asked him about the prisoners, and told him I would have the prisoners, but the marshal told me he dare not give them up willingly; I tell you, brothers, we have to pass four or five sentries, but I beg you not to fire first on them, till they first fire upon us; I shall be the foremost man; I shall go on before you, and I expect I shall get the first blow." Mr. Mohollan and others begged him that he would not go on in this matter; they would rather go and speak to the marshal that he should deliver up the prisoners willingly, if they would absolutely have them.

The men, when he told them this, followed him. He said to them, "You must not fire first; but if they do fire upon you, then I will order you to fire too, and help yourselves as well as you can." Did not wait till the

prisoners were released, when I heard this, thought there was going to be warm work, so rode off to Easton as fast as I could.

*Joseph Horsefield.* Live in Bethlehem; am a justice of the peace; was there on March 7th. Shortly before the last general election, the spirit of discontent and opposition was felt in the county of Northampton; different meetings called in different parts of the county and resolutions were passed; among others, one was that petitions should be formed to obtain a repeal of the alien and sedition laws, and the land-tax act. The Germans freely paid a five-penny bit for a copy, though they love their money so well. On election day the spirit of opposition against the measures of government was so universal, that a friend of government, by saying one word in favor of it, was ready to be abused; it was so in every election district in the county; and the county in general gloried that they had gained the day.

The marshal arrived at Bethlehem about March 3d. He went to Nazareth, and returned again about the 5th, telling me he had summoned a number of persons in Lehigh township, and that they were to be at Bethlehem on the 7th. On the 7th I went up to town, when he told me that he expected there would be some disturbance that day, and also told me that he had issued summonses for the *posse comitatus*. Between 10 and 11 the posse came; fourteen in number. About half past eleven, two men arrived at Bethlehem armed, from that quarter; they were disarmed, and sent up stairs into a room; about the same time a



number of persons arrived from Lehigh township, who were also sent up stairs by the marshal in a room by themselves; they were about eleven in number. Was present when Mr. Eyerly spoke to these prisoners, telling them that an armed force was formed with intention to rescue them; the prisoners answered that they by no means wished it; that they would submit to go with the marshal, rather than be rescued. In about an hour saw riding into the yard a number of horsemen, besides some footmen; went down and asked one of them what was his name; he answered Daniel Shaeffer. He had a sword at his side, and two pistols; next to him on horseback was Henry Shankwyler; next to him was Philip Daesch; also John Dillinger and Jacob Cline, not in uniform, but with swords in the scabbard; asked them what they wanted. Dillinger said that yesterday the marshal had taken Shankwyler and some other of their neighbors prisoners; that they were come to see Shankwyler's partner (accuser). Dillinger said he thought it was not right that he should be taken to Philadelphia. The marshal said that the judge had ordered it so; told him I thought they were in a very critical and dangerous situation; that the United States in less than twenty days could muster 10,000 men, which power I thought they could not withstand, and that it was best for them to surrender the prisoners to the marshal, and go home. They said that Shankwyler and the others were their neighbors, and that they would wait and see what should become of them. After dinner the peo-

ple collected very fast, and Dillinger began again to speak in behalf of Shankwyler. The marshal told him it could not be otherwise, go he must; Shankwyler answered that he had a family to take care of, and that he would not go. Saw a great number of armed people round the house, I think one hundred and twenty or thirty, and about two hundred and fifty unarmed; suggested to the marshal that I doubted whether he would succeed in taking off the prisoners, that nothing should satisfy them but the delivery of the prisoners; walked down stairs, and there saw men armed, pressing in; heard two men say if Henry, and that damned Eyerly, and that damned pot-gutted Balliott were there, they would tear them to pieces; proceeded up stairs and desired Mr. Levering (the tavern-keeper) to close the bar, thinking there was madness enough without stimulating it, which was done. Desired the marshal not to protract the delivery of the prisoners to the law. Mr. Mohollan and several others there pushed them back, but just then I heard some of the officers say, "Boys, in the ranks! in the ranks!"

I begged the marshal, for God's sake, to deliver up those men up stairs, for the rescue was perfect, in my opinion; the closing of the men would be only butchering, and I had no doubt the government of the United States would not let its dignity be trampled upon in this way. The marshal still continued to hesitate. By this time a number of persons had got into the house, adorned with large three-colored French cockades; worked

my way down stairs again, in order to be ready for a jump. By this time the prisoners were delivered. After the prisoners were gone about ten minutes, there was not a single armed man in, or about the house; never saw the prisoner till I came down to this place, but frequently heard the name of Captain Fries called.

*John Mohollan* (after describing the preliminary proceedings). Having met with those horsemen before we came back to the bridge, we returned with them, and all made a halt in the yard; spoke all I could to dissuade them from their purpose, but all to no purpose; had no answer I could understand, for they generally spoke in German or broken English; understood, generally, they wanted the prisoners, that they wished to give in security, and let them be tried in the county; that if they had done anything that was wrong, it was right they should suffer, but that it was not right to take them to Philadelphia. Heard Major Barnett say this, who interpreted what they said in German.. Saw a person I understood to be Captain Fries, and the marshal talking; believe it was the prisoner at the bar. The marshal said that they were not doing right, and that they must suffer; he made a demand of the prisoners, but that he should not be hurt; that he would be answerable for himself and the company, that none of his men should hurt him that day, but that he would not be answerable for any others that did not belong to his company.

*Jacob Eyerly.* Was out with the marshal the day before, when

he served the process. As we heard that the rescue was intended, it was agreed to send express to Easton to obtain the posse to aid him. It was agreed to take the prisoners, who had surrendered, up stairs and to send the deputation to meet the armed men; saw those three men come with Shankwyler; did not hear what passed, but saw Mr. Horsefield and Judge Henry go to them. Some time afterwards saw an armed force coming in, a great many on horseback, and many footmen with muskets on their shoulders; the marshal came up stairs and said that they were determined to have the prisoners, and he believed that Mr. Balliott and myself would be in danger of our lives if we went out of the house, and then desired me to undertake to guard the stairs, and told me to give orders that if anybody would come up with force, they should shoot them; looked out of the window and saw a company of riflemen, all with three-colored cockades, marching Indian file round the house; there were forty-two in that company; a person told me they were pointing their guns up to the window, and he was sure it was dangerous for me to show myself at the window. If I had gone to any place where they could have done it, they would have shot me; because the people in general appeared to be in such a rage that there was no reason in them.

I heard a terrible huzza and saw Captain Jarrett had arrived; had his pistols in his hand, and was walking up toward the stairs; had received a letter from Mr. Rawle, attorney of the district, that Mr. Jarrett had sur-

rendered himself and given bail, and that he declared he was a strong friend to government; I said to him, "If you are a friend to government, as you profess to be, you ought to go down and tell your people to desist," to which he made no reply; did not see anything more till the prisoners were released; saw Mr. Fries speaking with the marshal, shortly after the prisoners were requested to go down; but the minister, staying a little while up in the room, there was a call made for him particularly, and I went and requested him to go down. Shortly after, the armed men went off; saw Mr. Jarrett parading his light horse in rank before the door; he gave orders to march, and they went off.

Was one of the commissioners for assessing houses, and for laying a direct tax; got suitable characters to serve as assessors in Wayne and Luzerne; found no difficulties whatever; in Northampton county was not so successful; had received information from a gentleman in Philadelphia (Mr. Chapman) that he had traveled through a great part of Northampton county, and that in every tavern where he stopped, this tax law was the general topic of conversation, and that great pains were taken to find out who the persons were that were friends of the government so much as to be assessors, in order to persuade them not to accept of the appointment; found it was the case.

Appointed a meeting of the assessors of the third district of Nazareth, on 3d Thursday in November; two of them did not attend, and some of the others who did attend begged to be excused

from serving; that the people in their different townships were very much opposed to the law; that they thought it was dangerous for them to accept of it. The next day met the assessors of the second district at Allentown, all attended but one; had the same difficulty there as at the other place; had seen Mr. Kearne, the assessor appointed at Easton; he told me that it would not suit him to accept of it; requested him to name some suitable person. He mentioned Jacob Snyder, and told me he would notify Mr. Snyder to meet me with the rest; two of the assessors did not appear, and one from Hamilton did not appear willing to accept of it, but after a great deal of explaining and persuading he was prevailed upon; Snyder told me he had received his notice, and that he was willing to accept it; that the people were very much opposed to the law, and he did not very well understand it himself; but he thought he would endeavor to get some information; and that when he came there, the information he received was such, that he was determined to go after me, and accept the appointment, for he had been wrong informed about the law. At Wayne county I had no difficulty, except that one assessor told me that he was persuaded with difficulty to accept of the appointment; the assessor from Hamilton township (Nicholas Michael) told me that he had been obliged to fly from his house in the night to save his life, and begged of me to accept of his resignation; told him I could not accept of it, but that I would see perfect justice done. Next morning he came to me and begged

me, "Mr. Eyerly, for God's sake, put me to jail, so that I may be secure of my life, for if I inform against these people I and my family shall be ruined." At Hamilton township there were sixty or seventy persons assembled, some in uniforms; their arms were behind the door at the house of Mr. Hellers. I told them that I was come as their friend, and without any design of taking the least advantage of their conduct in opposing the assessors; that I had come to read the law to them and explain it. Pointed out the impositions practiced on them. Mr. Henry assisted me as much as he could, but all to very little purpose. The assessor again begged me, for God's sake, to accept of his resignation. I proposed that they elect their own assessor themselves; they would do no such thing, for, said they, "If we do this, we at once acknowledge that we will submit to the laws; and that is what we won't do." We requested by a friend not to go to Upper Milford, for the people were so violent that I should certainly be killed; replied that I would go; I was not afraid of any of them; took Mr. Henry along with me; found about sixty or seventy persons collected at the house of John Schymer; about twenty of them had French cockades in their hats, red, blue and white. I then asked them whether the general opposition was not on account of the stamp tax, and the house tax; they said yes; told them there was not a word in this petition against the stamp act; they seemed to be altogether satisfied, and said that they had been made to believe it was; went into the next room, where the

people collected; some of them appeared to be extremely violent and very abusive; told them I had come there as a friend to inform them of the law; read the law to them, and explained it in the German language, and told them it was their duty to submit to it. George Shaeffer jumped up before me, and said, "Mr. Eyerly, it is no law;" I told them that if they did not believe me, they might inquire of Squire Schymer whether it was or not. Mr. Schymer told them it was a law; upon which Shaeffer replied, "admitting it is a law, we will not submit to it." He further said, "Here I am, take me to jail; but you shall see how far you will bring me." Upon which a great many of them jumped up and said, "Yes, by God, if they shall only attempt to take any one to jail, we would soon have him out again." Some of them made use of very abusive language against the assessor, calling him a Tory rascal and the like. I proposed to them they should elect one; some of them said: "We will do no such thing; if we do, we at once acknowledge that we submit to the law, and that is what we will not."

An assessor (John Roming), told me that the people were so violent that he would not go upon his duties if anybody would give him 500 pounds; if he did, he must run the risk of losing his life.

The laws were executed in those four townships only since the troops have been there. All in the township opposed the execution of the law except three or four.

In March last the marshal had

process against persons in Northampton county; went with him first to Lehigh where he served process without difficulty; then to Bethlehem and Emaus; in a house of George Snyder we were sworn at and abused by him; he had a large club in his hand; called us rascals, highway robbers and the like; the marshal told him he only had a subpoena to appear at Philadelphia to give testimony; to which he answered in German, he would be damned if he would go. Then went to Shankwyler's, where there were fifty assembled in the room. Not knowing Shankwyler, Mr. Balliott pointed him out, and the marshal took him; the crowd closed upon us, and abused us, and in a very menacing manner accompanied with an almost universal cry of "Strike! strike! strike!" The marshal was persuading Shankwyler to submit, telling him the consequence of opposition; he at first declared he would not, but at length said he would do as Jarrett did. Some of the people said, if Shankwyler was to be taken out of his house, they would fight as long as they had a drop of blood in their bodies. The marshal turned to the crowd and told them that Mr. Balliott and myself were under his protection; one of the persons present tore the cockade from Mr. Balliott's hat; Shankwyler promised to meet the marshal at Bethlehem; remained while he served the process at Mr. Irexler's, there we first received information that an attempt would be made next day to rescue the prisoners; arrived at Bethlehem that evening, 6th March, and then the occurrences

happened of which I have given testimony.

*Samuel Toon.* (The testimony of this witness was in entire accordance with the two immediately preceding.)

*Andrew Shiffert.* Was one of the armed party that went to Bethlehem on seventh March, belonged to Jarrett's company. I was informed by John Hoover that all the light-horse were to meet at Martin Ritter's at ten in the morning; went to Ritter's; was told that they were going to Bethlehem to release the prisoners from the marshal; told them they would find what would be the consequences. The others said if they got the prisoners clear that day, there would be nothing done; it would be all over; that if the soldiers came with arms against them, it would be all at an end; wanted to go home, but they would not let me, telling me that Fogle would be at Guise's tavern, I agreed to go so far with them. Coming there, Fogle was not there, and I and Samuel Toon wanted to go home, for there were no officers there. They agreed to choose an officer, when the choice fell upon me; told them I would not go with them without they would obey my orders, and not say any more about taking the prisoners from the marshal. They professed to do so; we proceeded to within half a mile of the bridge; were met by four gentlemen from Bethlehem, and as they repeated that they would have the prisoners, I said I would have no more to do with them; then went into Bethlehem; did not go with them. When I got to Bethlehem was informed that they had got the prisoners out.

*John Dillinger.* It was rumored in my neighborhood that the marshal was coming up to arrest some persons; that they were to be taken to Philadelphia.

It was said that if any person was to be arrested innocently, it would be very hard for such a man, and he ought not to be suffered to suffer; that somebody had sworn against Shankwyler that he had two pistols and a sword on his table, and that he had sworn that if the assessors should come, he would shoot them.

*William Thomas.* On fifth March we heard that the assessors were going round to assess the houses in Bucks county.

On the sixth I met Capt. Kouder; he told me I must come down to the mill, that his company was assembling there. When we got there, several were met; part of them were armed. We went to Jacob Fries' tavern; there were many more people, I think about thirty. Two horsemen were sent to see if they could find the assessors, and bring them to Quaker town, or to Jacob Fries' tavern; then the order was for the company to go to Quaker town. A great many were armed, many who were not, had clubs. There was a drum and fife when we were at Quaker town. We all stood in a rank, and fired off, and hallooed huzza. Soon after the assessors came along. They were Esquire Foulke, John Rodrick and Cephas Childs; was at Zeller's when they came along, and they all began to run out of the tavern. When I came out, they had Foulke by his horse's bridle, and him by one leg, and they told him to get off. Captain Kouder

had hold of him; then John Fries came up and told him to get off. Fries told Foulke to get off; he wanted to speak to him; Jacob and John Hoover told them they should not abuse the man; he would get off without. They went into the tavern together. John Fries told him that he had forewarned them yesterday not to assess the houses, and yet they had come today again; told him that he should show his writings, what he had done in the township. John Fries read them, and gave them to him back again. Childs, the other assessor, was sitting on the table with five or six about him; told him that they should not abuse him, for I used to know him, but they told him he should not have gone about when they had forewarned him the day before, and they made him promise that he would not come again till further orders—till they knew how the law was; they thought they had as fit men in their township as what he was, and they wished to choose a man in the same township, if they must have it done. A traveling man named Captain Seaborn was there, drunk; some of them asked him whether he was for liberty or government; he said government; some one said if he said that again, he should be whipped. They were all pretty well drunk. I do not recollect ever seeing Fries drunk; Kouder was, and so might Fries, for what I know; but I had known him some time, and knew he was a sober man. They talked of Tories and stamplers; Foulke was one they called a Tory, and so were several others.

Next morning went to Marks' tavern. John Fries had the com-

mand. We met young Marks; he said it was not worth while to go to Millars town, that the prisoners were up at Bethlehem, and that the Northampton people and the light horse had all gone there. Some were for going back again; some, as they had come so far, was for going up to Bethlehem, to see what was going on there; so we went on. Old Marks and John Fries said so; stopped at Ritters; there was a liberty pole there. Then we went on to Bethlehem. When we came to the bridge, they said they could not get over, the bridge was shut; John Fries rode up, and asked whether they required toll or not; they said—Yes. Then he told them to count his men, and told us to follow him.

Do not know who paid the toll; we did not. When we got over the bridge, two men met us, and said we should not hurt them; Fries told them that he should hurt nobody without they hurt him first. Then Judge Mohollan came and spoke with him; do not know what either he or Fries said. When we got up to the tavern at Bethlehem, the whole of Staeler's rifle company were there. They wanted one to go up and talk with the marshal, and they from Bucks and Northampton said John Fries was more fit to go up than e'er a man that was there. Then John Fries and one Hoover went up stairs. After a while Hoover came down; Fries stayed up; when he came down, he kept dashing and swearing, and said force should do; give him nine or ten of the best riflemen in the company, and he would storm the house; a great many of them told him he should not do it; he said he would. Jacob Hoover,

Mitchel and Mr. Mohollan endeavored to keep him off. Fries, when he came down stairs, fetched some writing down with him, that he got from the marshal, which he read to the company. He said the marshal dared not give up the prisoners, and therefore that they would take them by force of arms; he asked, "What shall we do now—take them by force of arms or how?" Several of them said, since they came so far they would have them. Frederick Henry said, since they were come so far, it was a damned shame not to have them. Then Fries went up stairs again, and said he would go and talk to them once more. When he came down again, he said that the marshal dared not give them up, without they took them by force of arms. They then told him that he should go and do something pretty soon, for it was getting late. Some said it was better to let Fries have the whole command of all the men. Fries said: "For God's sake, don't fire boys, till I am fired upon first;" he said this three or four times over. He went up and talked to the marshal about half way up stairs. Henry told me Fries was telling the marshal that if he did not give up the prisoners, they would fire on them, so that they should not see each other for smoke. After that, the door was opened, and I saw some of them come down. Fries said he was glad Hoover did not go in along with him, because he was too much of a fool; he thought this would not have done so well as it did; he did not want him there. We retired from Bethlehem altogether when we had got the prisoners. Fries went to the minister

after he was released, in another room; he pulled off his hat to the minister, and told him he must thank him that he had got out; he said he was out, but he could not thank him, for all.

*George Mitchel.* Keep a tavern in Lower Milford township, Bucks county. There was a great disturbance and discontent respecting this house law; a meeting was advertised for 8th February, at the house of John Cline to consult about the house tax law. They formed an instrument of writing; cannot recollect the particulars of it. It was drawn up by John Fries; I assisted him. It was signed by about fifty. Monday following James Chapman told me I should tell Jacob Hoover that he should give notice that if they would choose an assessor of their own, they should be welcome; and any man that was capable of the business would be admitted into the office. Who opposed it, I don't know; but it was reported that it was not adopted. We advertised a meeting to be held at my house in February; there were a great many of the inhabitants at the meeting; Squire Foulke and Mr. Chapman attended it. The people behaved very disorderly; Jacob Kline asked me what the meeting was intended for; told him I understood by Squire Foulke, that the Germans were very ignorant of the law, and that he called them together to read and explain it to them; I desired him to try to pacify the people; and I believe he did his endeavor, but it proved in vain; at least they did not read the law; he thought it was in vain, there was such a clamour. John Fries was not at the meeting; don't recollect any-

thing afterwards till the assessors came the 5th of March. They took the rates of my house and my neighbors. They were Mr. Childs, Mr. Foulke and Mr. Rodrick. Next morning heard there had been an uproar about driving away the assessors; that they were going to Millars town the next day; concluded to go and hear what was going on; they said they were going to meet the Northamptons who were going for the relief of the prisoners; do not know of any in particular who took the command. Some wished to go to see Bethlehem, some to see the bridge; so they concluded to go on. When we got to the bridge at Bethlehem, there were a great many armed men and light horse, and two rode over the bridge towards us from the other side; after a while we went over to Bethlehem. A great many of the company was formed before the house, who seem to speak out that they would have the prisoners. Fries went in; did not hear who ordered him or who desired him. A short time after, in the course of five or ten minutes, Henry Hoover came out to us, and said he was sergeant of their company, and he was chosen to demand the prisoners. He said he went up stairs, and somebody gave him a push, and had like to have tumbled him down stairs, and he came out in a great passion. He went on in a great rage; he said if they would only give him ten men, he would storm the house. A short time after, observed Fries come out, and he said "silence!" "Gentlemen, an officer of the United States says he cannot deliver up the prisoners, unless they are rescued by force of arms; so,



he said if you are willing, we will; I will go foremost, but if we do, I beg of you, none of you fire till they fire on us first, till I give the word, and if I drop, then you must take your own command." Heard nothing afterwards of the proceedings in, nor out of the house; on 18th March, a meeting was held at Marks' to choose a committee of the three counties of Northampton, Bucks and Montgomery to consult what was best to be done. John Fries was there. After the meeting, I said to him: "John Fries, you never intended to resist the law, did you?" He made me answer, "Yes, I did." We did not in particular mention any laws. There was a meeting at my house on Easter Monday, March 25th to appoint an assessor. John Fries was there. He said it would not suit him to vote now, as he had been against the law throughout.

*Cross-examined.* At the meeting at Marks', it was generally agreed that there should be a submission to the laws. It was recommended to submit, and I believed it was agreeable to the meeting; I heard no opposition to it.

*James Chapman.* Was a principal assessor under the act for laying a direct tax in all but Lower Milford, the assessments were carried into effect without opposition, except some little threatenings. The assessor of Lower Milford was Samuel Clark. Clark called upon me and told me he thought it was not safe to go about, from the disposition of the people at that time; told him that I would meet him the next day at Mitchel's tavern in Milford, and meet the people to know what their complaints

were; examined Mitchel to know what were their complaints; Mitchel signified that the people were dissatisfied that the assessor was appointed without their having a choice; for they wished to choose for themselves; told Mitchel if they would choose a man of character, I would use my influence to have him appointed; wrote to the commissioner, stating the situation we were in, and told him what I had done; he seemed not to be willing to indulge them with it.

Seth Chapman was commissioner. I told him it would ease the minds of the people if it were done. At length he consented, but with reluctance. However, they never chose one.

Later, I was told by Squire Foulke, that the township was advertised to meet at Mitchel's and if I would attend there he would meet me; as I got to the house, saw ten or twelve people coming from towards Hoover's mill; about half of them were armed, and the others with sticks; went into the house, and twenty or thirty were there. Conrad Marks talked a great deal in German, how oppressive it was, and much in opposition to it, seeming to be much enraged. His son, and those who came with him, seemed to be very noisy and rude; they talked all in German, which, as I did not know sufficiently, I paid but little attention to them. They were making a great noise; huzzaing for liberty and democracy, damning the Tories, and the like; saw no disposition in the people to do anything toward forwarding the business; got up to go out; as I passed through the crowd towards the bar, they pushed one another against me.

No offer was made to explain the law to them while I stayed; they did not seem disposed to hear it. They did not mention my name, but abused Eyerly and Balliott, and said how they had cheated the public, and what villains they were; recollect Conrad Marks said that Congress had no right to make such a law, and that he never would submit to have his house taxed.

They seemed to think that the collectors were all such fellows; that they cheated the public and made them pay, but never paid into the treasury; got into the sleigh and went off; soon after they set up a dreadful huzza and shout. Stopped at Jacob Fries' tavern and waited for Mr. Foulke, who soon came; Clark, the assessor, who still persisted in not having anything to do with it, for he thought it was not safe for him, wrote to the other assessors, requesting them to meet at Quaker Town on March 4th. Rodrick, Childs and Foulke met me there, no others came; we agreed to meet at my house next morning at 9. We met, and I went with them to Milford, to Samuel Clark's, he was not at home. I went to Jacob Fries' tavern to wait for him; they went to Mitchel's to take the rates. Clark soon came; told me he could not take the rates, he might as well pay his fine, if it cost him all he had, they were so opposed to it that he could not think himself safe, for he should receive some private injury. John Fries came up just then; told me he was very glad to see me; that he understood I had been insulted in their township, was very sorry for it, had he been there it should not have

been done; told him I thought they were very wrong in opposing the law; he signified he thought not, that the rates should not be taken by the assessors. Told him the rates certainly would be taken, and that the assessors were then in the township taking them. He answered, "My God! if I was only to send that man (pointing to one standing by), to my house to let them know they were taking the rates, there would be five or seven hundred men under arms here tomorrow morning by sunrise." Told me he would not submit to the laws. Told him I thought the people had more sense than to rise in arms to oppose the law; government must certainly take notice of it, and send an armed force to enforce the laws. His answer was that "if they do we will soon try who is strongest." Told him they certainly would find themselves mistaken respecting their force; he thought not; mentioned the troop of horse in Montgomery County, and the people at Upper and Lower Milford, and infantry, who were ready to join; said he was very sorry for the occasion, for if they were to rise, God knew where it would end; the consequences would be dreadful; told him they would be obliged to comply; he then said huzza, it shall be as it is in France, or something to that effect. He then left me.

Fries did not appear to be intoxicated; scarce ever saw him intoxicated. On the same day, the assessors came to Jacob Fries' tavern. We ordered dinners there, and Childs undertook to take the rates of Jacob Fries' house. John Fries came in; he

addressed himself to Squire Foulke, telling him he was very sorry to see him there; he was a man that he had a great regard for, but that he was opposed to the law himself. "I now warn you," said he, "not to go to another house to take the rates; if you do, you will be hurt." Did not wait for reply, but went out of the room. He seemed much irritated.

*John Rodrick.*—Was one of the assessors for Lower Milford. We got orders to meet at Quaker Town on March 4th, and go the next day to get the rates at Milford. Only three of us attended. We agreed to meet at the principal assessor's house the next morning, which we did; we proceeded taking the rates, Mr. Childs, Mr. Foulke and myself. After dinner John Fries came into the room. He said he heard we were come to take the rates of the township; we told him yes. He said he would warn us not to proceed, else we should be hurt; said he was sorry for Squire Foulke and Mr. Chapman, for he respected them very much; said he was opposed to the law, and he would not submit to it. He seemed to be a little in a passion. We got on our horses, and proceeded at taking the rates: I and Foulke went together, and Childs by himself. Heard somebody hallo to us: we stopped, and saw it was John Fries and five men more. Fries said that he had warned us not to proceed, and we would not hear, and now they were come to take us prisoners. I asked by what authority: with that he made a grapple at the bridle of my horse, he caught hold of my great coat, but he could not hold;

rode off then: after I had got about two rods, turned round again; told him I was surprised at his conduct, that he had behaved so. He began to damn and curse, and walked back towards the other men: he mentioned that if he had a horse, he would soon catch me. I rode up nearer to those other men: they had stopped Squire Foulke: as Fries returned back to his men, he said, "Men, let Foulke go, as we cannot get Rodrick; tomorrow morning we will have him. I will have seven hundred men together tomorrow, and I will come to your house, and will let you know that we are opposed to the law."

We agreed to quit taking the rate at Lower Milford at that time, as we thought we should not be able to do anything. When we were going home through Quaker Town (on March 6th) Cephas Childs rode before us. I and Squire Foulke rode together. When we came to Quaker Town, Childs turned into Squire Griffith's; we found a great many people armed with guns, and with uniforms; so I said to Foulke, "Here is Fries and his company; we won't stop if we can help it;" rode through them, but when I had got half through them, they halloosed to me to stop; a great many halloosed, and came running on both sides the road, some with their clubs and muskets to strike me. They did not strike me; rode quickly through them; saw them running to come to strike. When I came to Zeller's tavern, there was John Fries at the porch; he halloosed to me to stop. I stopped and asked Fries what he wanted. They damned me, and told me I

should deliver myself up; told him as long as he used such language, I would not. There was order then given to fire at me; cannot tell who gave the order, but there were two men standing close together at Zeller's door; they pointed their guns: as I saw that, I rode off; did not hear whether it was Fries or not who ordered them to fire. They hallooed to stop me: they hallooed out to get horses to pursue me, but they did not pursue me; cannot say that Fries had anything in his hand at that time, but the others had clubs. Fries was from me at that time perhaps five or six rods.

*Cephas Childs.* Was one of the assessors for the valuation of houses in Bucks County. We met to make our returns at Rodrick's; Everhard Foulke met with us. Foulke told James Chapman that he dared not go into the township, for he understood that some threats were thrown out against him, and he rather wished that the people would appoint some other person, themselves to do it. The commissioner consented, that if they should make such an offer, and appoint one, he would recommend him; if not, he said we must go and assist in that township. Was ordered to meet the rest in Quaker Town on March 4th. Foulke, the principal assessor, and myself, met there. The first house we went into was Daniel Wiedner's; told him I was come to take down the rates, under the revenue act; he appeared to be very angry; reasoned with him, telling him, if he wished to read the law, he might; told him the consequences of opposition, but he might have

ten days to consider it, and give in his account if he chose to take that time. He said, "take it now, since it must be done." He gave me his account accordingly, and appeared contented. He said further, "we have concluded not to take it, as we expect the act will be repealed." I did not get on my horse till I got up to Mitchel's, where the other two assessors were. Widener went out a little before me, and he was there when I came, walking about, seemingly very angry; again reasoned with him. Another objection he made was that the houses of high value were to pay nothing, while smaller ones, and of small value, were to pay high. Took several houses in my way, and went to Jacob Fries; met John Fries, who shook hands with me, told me he was glad to see me, and asked me to take a drink. He came in again after we had dinner, and said, "I forbid you going to any other houses in the township." He mentioned that Foulke and Chapman, or Rodrick, were men he much esteemed. He said if we did go to any other houses, we should be, or would be, hurt. We then proceeded to assess. Where English people lived, there appeared no objection, except at one place. The people there said that if they did give in the account, there were some ordinary people in the neighborhood, and they would be set on by them to do them an injury. That afternoon went to David Roberts'; his wife seemed very anxious, and wished her husband had been there, for she said I should not go home alive; went afterwards when he was at home, and he said he had no objection,

only for his neighbors. He said the people there had agreed not to let the rates be taken yet; they had already chosen an assessor in their own township; told him I wondered they did not let him go on; he signified that he was a person of an obnoxious character, and therefore they did not wish to accept him. In our return called at Squire Griffith's; his wife told me that they were come there to take us, and that there were forty or fifty men there, and she did not know what they were about. A little girl came in and said that they had hold of Squire Foulke's horse by the bridle, going to take him; went to the window, and saw them all around him. Did purpose to go out; but at their persuasion I staid. The little girl came in again, and said they had taken Mr. Foulke into Enoch Roberts' tavern. After a short time Fries came into the house; he took me by the hand, and I rose up; he said, "Mr. Childs, you must go with me to my men;" as we walked along, he said, "I told you yesterday that you should not go to another house, and if you did you would be hurt, and we are now come to take you prisoner, if we find that you will go on with the assessments." My answer was, we are obliged to fulfill our office, and we cannot do otherwise, unless we are prevented. When we went into the house, he addressed himself to his men and me: "Here are my men—here is one of them."

Some of them soon began to use rough language. A person came behind me, and caught me by the collar over the shoulder, and said, "Damn you, Rodrick,

we have got you now; damn you, you shall go to the liberty pole and dance round it;" the house was then crowded full, and they pushed me so I could not turn round; had several thumps, which seemed more with the knee than the fist. When he got to see my face, he damned me that I was not Rodrick, but that I was the other damned son of a bitch that he saw sitting at Rock Hill; he had mistaken me. A person came up to me and said, "Keep a good heart, and you will not be hurt." I said, "I am not Rodrick, nor did I ever assess in Rock Hill;" he said, "You are a damned liar." With that more came up, and pressed about me, and took hold of me. There was a good deal of talk, some in German and some in English. Told them my name was Cephas Childs; that I was not known in the country; but had no doubt many of them, though they did not know my face, knew my name; and there were some who knew me as Coroner of the county. A man said, "If he is Childs, he is no better than the other." They asked how they liked it where I had been; told them some of them had appeared dissatisfied in the first instance, but now every man almost where I assessed was satisfied; they said I was a damned liar, for the people had told them that they would join them in the suppression of it, and my own neighbors would fight against me. Asked me if I had taken the oath of allegiance to the United States; told them I had; they asked when; told them I could not recollect the time, but as soon as the law required it; asked me if I was a

friend of the government; told them I was; they then began to damn the government and the governor, and shoved me about, many of them taking their Maker's name in vain; they damned the house-tax and the stamp act, and called me a stampler; they damned the alien law and sedition law, and finally all the laws; the government and all the laws the present Congress had made. The Constitution also. They did not mention what constitution, whether of this State or of the United States. They damned the Congress, and damned the President and all the friends to government, because they were all Tories, for that none were friends to the present government except Tories. Asked me if I had been out in the last war; told them the law did not require me to go, I was under the tuition of my parents; they said they had fought for liberty, and would fight for it again. They said they would not have the government, nor the President, and they would not live under such a damned government: "we will have Washington;" others said, "No, we will have Jefferson, he is a better man than Adams: huzzah for Jefferson."

They insisted on my taking an oath of allegiance to them, if I did so, I should not be hurt; had no way to waive it, and I asked them what their government was. One answered Washington: I said I had taken an oath of allegiance to Washington's government already. They then said Jefferson; "we will have none of the damned stampers, nor the house tax." They said they embodied themselves to oppose the government; they meant to do

it, that was their design in coming there.

The words were these: "We are determined to oppose the laws, and we have met to do it; the government is laying one thing after another, and if we do not oppose it, they will bring us into bondage and slavery, or make slaves of us; we will have liberty." They mentioned the number of men that had joined them, or sent them word that they would join them. They said all Northampton County to a man would join them, except some Tories. Between Quaker Town and Delaware river, they could raise ten thousand men, if they should be wanted, to oppose the sedition and alien laws, and fifty other damned laws. They said that General Washington had sent them account that he had twenty thousand men all ready to assist them in undertaking to oppose the laws; begged them not to believe it, for it could not be, and somebody was endeavoring greatly to impose upon them. One or two of them spoke very good English, but they were altogether Germans.

*Cross-examined.* Fries took me in there, and leaving me in custody, went away. They said General Washington had certainly wrote to them so and so. One of them said he would be damned if it was not so, for he had seen the letter from Washington. Captain Fries came toward me, and seemed very much surprised; he said, "Mr. Childs, I understand some of my men have abused and insulted you." He said he would not allow me to be abused; he appeared to be distressed for the usage I had received, and if I would tell him

who it was, he said he would make him behave himself. He then told me to come into the room; said he respected me, and did not wish me to be abused. Told him I thought it hard that he should leave me amongst a parcel of intoxicated people. Told me he hoped I would not impute that conduct to him; told him I was not much injured, and, therefore, hoped he would not think about it; said his men were civil men, and seemed to wonder such a thing had happened; he then gave me something to drink. He took me into a room and demanded my papers while I had been an assessor. While he was with me, no person insulted me. He then looked at those I had given him, and saw Hilltown at the top; he said, "Hoho! my boys, we have got what we wanted;" and went away, taking the papers with him; most of them followed him out of the room. They rushed in again, without Fries, and some got hold of me. They brought Daniel Weidner along with them; some had pistols, guns, clubs, etc., and some swords. They seemed very angry, and were pushing upon me. Weidner insisted on the return of the rate I took of him yesterday; he said he would have it. I desired him just to acknowledge—did not he give it me freely yesterday? Did I not say I would not take the measure of your house by force, but you gave me the rates with a free will? "Yes," he said, "but I was not forced, and, therefore, I want it again." Others came in, shook me very hard; threatened me, and said I should be shot; some brought in their guns and told me if I should be seen in

Milford township on the business, I should be shot. This person with the sword threatened a good deal. He was called Marks, the elder. William Thomas came forward, said he knew me, and that they should not abuse me. I reasoned with them of the bad tendency of such conduct, and told them that I really thought if I had the law with me, I should persuade them to allow it. One of them came to me and acknowledged he had abused me, and was sorry for it, and wished me to forgive him; think his name was Smith. Fries came back again with the transcript and delivered it to me, and told me I must go home and must never come back again to assess, or I should be shot; insisted on my promising I would not do it. My reply was, if they ever caught me going back without authority, I would give them leave to shoot me. He then told me, Foulke and you may inform the government what has been done as soon as you please; we can raise one thousand men in one day, and we will not submit to it; said there were a number of laws they were opposed to, and one of those laws was not putting in execution; appeared to think if that was stopped, the others would be. They were determined to oppose the laws; there were so many laws coming on, it was time to stop them, if they were known to oppose them, the others would not be brought forwards. Fries was not present when these words were used.

*Judge Peters.* The first time I heard of this uneasiness in the counties of Bucks, Northampton and Montgomery was in Febru-

ary. It was by depositions being sent to me by the attorney of the district (Mr. Sitgreaves) relative to a number of persons; examined some witnesses relative to it, and concluded to issue my warrants against the parties charged for the defendants to appear before some justice of the peace, or judge of the county, in order to give bail for their appearance at the Circuit Court of the United States. Doubted myself the propriety of the form and substance of the warrants, because I thought that the justice, or judge before whom bail was taken, ought to be acquainted with the whole case, and ought to have the proof of the fact before him on which the proof of the warrant was found.

Found that some of the very persons who were charged before me were magistrates, and I wish I could say that they were the

only magistrates who were engaged in this business. These were the reasons that induced me to alter the form of my warrants; found that too many magistrates were concerned in flattering the prejudices of the people, and engaging in seditious practices, and encouraging the people in their mistakes, for me to trust them; and I finally found that there were but two magistrates that could be depended upon, and they told me that they were insulted in the performance of their duty to the United States. The marshal wrote to me official statements at sundry times of the difficulties he met with, and at one time informed me that the prisoners had been rescued by force of arms from his possession. John Fries was brought before me. This examination he signed in my presence.

*6th April, 1799.*

The examinant confesses that he was on the party which rescued the prisoners from the marshal at Bethlehem: that he was also one of a party that took from the assessors at Quaker town, their papers, and forewarned them against the execution of their duty in making the assessments. The papers were delivered with the consent of the assessors, but without force; perhaps under the awe and terror of the numbers who demanded them, and were by this examined and delivered to the assessors. He confesses that, at the house of Jacob Fries, a paper was written on the evening preceding the rescue of the prisoners at Bethlehem, containing an association or agreement of the subscribers to march for the purpose of making that rescue; but he is not certain whether he wrote that paper. He knows he did not sign it, but it was subscribed by many persons, and delivered to the examinant. He does not know where that paper is. The examinant confesses also, that some weeks ago, he wrote (before the assessors came into that township) an agreement which he, with others, purporting that, if an assessment must be made, they would not agree to have it done by a person who did not reside in the township, but that they would choose their own assessor within their township. A meeting has been held in the township since the affair at Bethlehem, for the purpose of making such a choice. The ex-



aminant went to the place of election, but left it before the election opened. The examinant further acknowledges that his motive in going to Bethlehem to rescue the prisoners was not from personal attachment, or regard to any of the persons who had been arrested, but proceeded from a general aversion to the law, and an intention to impede and prevent its execution. He thought that the acts for the assessment and collection of a direct tax did not impose the quota equally upon the citizens, and therefore were wrong. He cannot say who originally projected the rescue of the prisoners, or assembled the people for the purpose. The township seemed to be all of one mind. A man unknown to the examinant came to Quaker town, and said the people should meet at Conrad Marks' to go to Millar's town. The examinant says that, on the march of the people to Bethlehem, he was asked to take the lead, and did ride on before the people until they arrived at Bethlehem. The examinant had no arms, and took no command, except that he desired the people not to fire until he should give them orders, for he was afraid, as they were so much enraged, that there would be blood shed. He begged them, for God's sake, not to fire, unless they had orders from him, or unless he should be shot down, and then they might take their own command. That he returned the papers of the assessors which had been delivered into his hands, back to the assessors privately, at which the people were much enraged, and suspected him (Fries) of having turned from them, and threatened to shoot him, between the house of Jacob Fries and Quaker town.

John Fries.

Did not make any promise or threats to extort it from him, but he chose to make a voluntary confession; his manner was that of a man not having done anything wrong, but perfectly collected, and possessed of his faculties. It was read to him afterwards, to which he acceded, and, thinking a part not fully enough explained, added the latter part.

*The District Attorney.* Did you not discover manifest signs of terror coming from the districts where the army had not marched? Yes, in many instances—some very strong; it was even attempted to raise troops to oppose the army, if they went up. Testimony now given to me that troops were endeavored to be raised, and nothing, I believe, but the rapidity of the progress of the troops pre-

vented its execution; believe that unless the army had gone through the whole country, there would have been the most atrocious instances of violence. Did not some of the witnesses give their testimony under great reluctance, owing to fear? Yes, I had, in some instances, to state the protection of the United States, and their determination to lay hold of persons who should threaten, in order to stimulate them; some said, after they had given their testimony, that they were afraid to go home; in general, they were the most unwilling witnesses I had ever examined. One man was even afraid because I was in his house, asking for some refreshment, as, he said, he should be suspected for harboring me; was an associate judge of the Common Pleas; is-

sued a number of subpoenas to make some inquiries respecting the opposition to the tax law, at the instance of Mr. Eyerly, one of the commissioners. The witnesses generally appeared much afraid at opening themselves, and among the people there were many opposed to the law. One witness appeared in great terror; when he was called up to give his testimony he cried like a child, and begged, for God's sake, that we would not ask him, for that the people would ruin him when he returned

home; all the witnesses were much agitated; discovered a general opposition to the execution of this law, and was apprehensive of danger from the threats which were given.

*Mr. Chapman and Mr. Childs* (recalled). The measurements of a house was always given by the owner; we never measured any houses. Size, length and breadth were told us, or the proprietor had ten days to send it in; we left a note for those people that were not at home.

*Mr. Dallas* said that, though they wished to give as little trouble on the part of the defendant as possible, yet he should produce two or three witnesses, in order to show that this indisposition, which was manifested to permit the assessment, was owing to the uncertainty those people were in, of the real existence of the law; that the prisoner himself was under the idea that it was no law; and that they had no intention of opposing Congress by force of arms, but that they wished for time, in order to ascertain its real existence, and if the law was actually in force, that they wished, agreeably to their former custom, to appoint assessors from their own respective townships. It could be shown also that Fries was perfectly quiescent after the proclamation, and that Mitchel was entirely mistaken as to the expressions said to be used by Fries at the meeting at Conrad Marks'. As the defendant's counsel, however, wished to have time previously to examine the witnesses, he stated that they would not be able to produce them at this stage of the trial.

#### MR. RAWLE'S SPEECH.

*Mr. Rawle* then opened the constitutional definition of treason, as consisting of only two parts: "levying war against the United States, and aiding the enemies of the United States." As it is only the first of these species of treason the prisoner is charged with, it is only necessary to ascertain what is meant by levying war against the United States. *Mr. Sitgreaves* has stated that, levying war against the United States consisted, not only in a broad sense of rebellion openly manifested, with an avowed intention of subverting the government and Constitution of the country, but

also with force of arms, or by numbers sufficient for that purpose, to cause an impression of terror: either one of these, or altogether, used to prevent the execution of the laws, or of any particular law of the United States, from motives, not of a special but of a general nature—is treason. This position, I believe, is perfectly correct, and has already received the sanction of a court of the United States, respecting the insurrection in the western parts of Pennsylvania. See 2 Dallas, 348, Mitchel's case. This doctrine is laid down in terms short and concise, and is such as is founded on the particular authority of all the writers on English law.

“Bradford—attorney. The design of the meeting was avowedly to oppose the execution of the excise law; to overawe the government; to involve others in the guilt of the insurrection; to prevent the punishment of the delinquents, etc.

“Patterson (Justice). The first question to be considered is, what was the general object of the insurrection? If its object was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offense, in legal estimation, is high treason; it is a usurpation of the authority of the government; it is high treason by levying war. Taking the testimony in a rational and connected point of view, this was the object. It was of a general nature, and of a national concern.” (Page 355.)

Let us attend, for a moment, to the evidence. With what view was the attack made on General Neville's house? Was it to gratify a spirit of revenge against him as a private citizen, as an individual? No:—as a private citizen he had been highly esteemed and beloved: it was only by becoming a public officer, that he became obnoxious, and it was on account of his holding the excise office alone, that his house had been assailed, and his person endangered. On the first day of the attack, the insurgents were repulsed; but they rallied, returned with greater force, and fatally succeeded in the second attempt. They were arrayed in a military manner: they affected the military forms of negotiation by a flag; they pretended no personal hostility on General Neville; but they insisted on the surrender of his commission. Can there be a doubt, then, that the object of the insurrection was of a general and public nature?

Patterson (Justice) in the charge against Vigol, says:

"With respect to the intention, there is not, unhappily, the slightest possibility of doubt. To suppress the office of excise, in the fourth Survey of this State; and particularly, in the present instance, to compel the resignation of Wells the excise officer, so as to render null and void, in effect, an act of Congress, constituted the apparent, the avowed object of the insurrection, and of the outrages which the prisoner assisted to commit. Combining these facts and this design, the crime of high treason is consummately in the contemplation of the Constitution and laws of the United States." (2 Dall. 246.)

This, you will perceive, gentlemen of the jury, is not preventing the execution of all the laws, or all the authority of the government, but of "an Act of Congress." It is a usurpation of the authority of the government, and thus it is levying war, and is high treason. Taking it in this point of view, this was the very object of the insurgents at Northampton, and was of a public, of a general, and not of a private or special nature. In the case I referred to, the prisoner acted different from the prisoner at the bar; he acted in a subordinate station; he does not appear to be a first character in that treasonable enterprise.

Gentlemen, the law thus laid down by the court, upon that occasion, was derived from the English authorities to which I shall now refer you. 4 Blackstone, p. 81, defines that branch of treason of which we are now treating,—"Levying war against the king (substitute here the United States for king), is, pulling down all enclosures, meeting-houses, prisons or brothels." Although bawdy-houses are illegal, yet by any individuals not authorized, taking the authority which alone is vested in the government, it is a usurpation of the authority, and the act being of a general, and not of a special nature, is treason. Lord Chief Justice Hale, whose name will ever be endeared by the piety, the humanity, and the sound legal learning which characterized him, has a chapter upon this subject of levying war against the king. (Hale, P. C. 105.) He says, to march with colors flying, drums beating, etc., if on a matter of a public or general nature, is high treason. Treason in levying war, by this definition, consists of

two sorts. First, marching expressly, or directly against the king's forces: secondly, interpretatively, or obstructively; doing a thing of a general nature. If to pull down a particular inclosure, it is only a riot; but if to pull down all inclosures, it is levying war against the king, because it is generally against the king's laws.

"Insurrections, in order to throw down all inclosures, to alter the established law or change religion, to enhance the price of all labor or to open all prisons—all risings, in order to effect these innovations, of a public and general concern by an armed force, are, in construction of law, high treason, within the clause of levying war; for though they are not leveled at the person of the king, they are against his royal majesty, and besides, they have a direct tendency to dissolve all the bands of society, and so destroy all property and all government, too, by numbers and an armed force. Insurrections, likewise, for redressing national grievances, and for the expulsion of foreigners in general, or indeed of any persons living here under the protection of the king; or for the reformation of real or imaginary evils of a public nature, and in which the insurgents have no special interest—risings to effect these ends by force and numbers, are, by construction of law, within the clause of levying war." (Foster, C. L. 211.)

1 Hawkins, Chap. 17, Sec. 23, p. 37, is much to the same effect; and see also Douglass, 570, in the case of Lord G. Gordon. The case there on the part of the prosecution was an attempt to force the repeal of an act of Parliament, and this was called high treason, although the defendant was not convicted. (Kelyng, pp. 70, 75.) So in the case of Messenger, Appletree and others.

It will probably be said by the defendant's counsel that this should be simply considered as a rescuing prisoners from the custody of the marshal, and that is not treason, and that a number of crimes of a less degree must be committed in or to make it treason, as arson, burglary, and murder. But I would observe, that when these crimes are committed, one or more of them, they are not component parts of treason, but they lose their qualities and their name in the absorbing crime—treason. So when General Neville's house was burnt, it was said only to amount to arson: to that it was answered by Judge Patterson, were it not for the

treasonable purpose with which this was done, it would be so; but the guilt rose to treason in the intention. Admitting it is a crime, and worthy of a punishment, the question is, whether or not it must be considered as one of the means made use of to obtain the end in view? If a man break open prison, except where a person is convicted for treason, it was ruled to be only a great riot. If several were rescued thereby, it was a riot and rescue, except those persons rescued were convicted for treason; and where it was without any particular view to the persons themselves, and where the prisoners were unknown, then the rescue becomes a part of the treasonable act, and that, with other facts, constitutes the person guilty of treason. (1 Hale, 133.) In 4 Blackstone, you will find an answer to what Mr. Dallas said this morning ought to be in favor of the prisoner. To-wit, an ignorance of the existence of the law.

Suppose every man who would profess himself ignorant of the existence of a law was exculpated from the observance of it, or from the consequences of breaking it, to what would that doctrine lead! It would be for the interest of every man who wished to oppose a law, to keep himself under the shelter of this want of knowledge, in order that he might sin with impunity—without knowing it. This is a mistaken fact, and an error in point of law. I make these observations, not because I suppose that the defense will be seriously set up, or that, did it exist, you would be in the least guided by it, but under the impression, that when you come to examine all the facts, you will discover that it was not so.

Unless these points which I have laid down are controverted, I shall not trouble you with more points of law, and shall leave the observations I am farther to make, to a later period of the case.

MR. DALLAS' OPENING FOR THE PRISONER.

*Mr. Dallas.* It has become so uncommon in the State of Pennsylvania to be employed in a cause, upon the issue of which the life of a fellow creature depends, that, I am con-

fidest, the court and jury, as well as the counsel on both sides, are prepared to give a solemn, candid and patient attention to the present investigation. It is, gentlemen, a question of life or death; and if what we have heard is true, that the prisoner is a husband and a father, it is a question whose importance extends beyond his own life, to the existence and well-being of a miserable family. If I should manifest, therefore, an extraordinary solicitude to secure the attention of the jury, as long as the occasion shall require, these considerations would, I think, furnish a sufficient excuse; yet, permit me to add to my justification another remark. It is not only the life of John Fries, and the well-being of his family, that are at stake on this trial; but, we all know, that the impressions made on your minds, and communicated to the public by your verdict, may reach the lives and families of many more unhappy men now under indictments for a similar crime. I must confess that I feel agitated by the prospect; for, if it appears so awful, so interesting, as it evidently does, to the court and audience, how must it affect us who are the counsel for the prisoner, charged with the development of every principle and of every fact, that can tend to acquittal? As it relates to the counsel for the prosecution, the difficulties are comparatively small. They have had an opportunity amply to explore all the facts; to calculate the effects to be produced, and to point their testimony precisely to the object of the charge. We, who are counsel for the prisoner, are ignorant of the man and of his connections. Till you were impanelled, we knew nothing of the evidence to support the prosecution; and could, therefore, be little prepared to encounter and repel it. Besides, in all our inquiries for the means of defense, as well as in our examination of the witnesses, we have been embarrassed by the foreign language in which the parties have spoken. That some of you, however, as well as the opposite counsel, understand the German, has been a source of consolation to us; for, it is your province to decide on the facts.

But these are not the only obstacles which we have to encounter. I am sure I shall not be misunderstood when I say,

that the prosecution appears to be strongly marked with the authority and influence of government.

It is, I grant, incumbent upon the government to exercise its powers for the punishment of crimes; but it is essential to a fair discussion of every accusation, that the acts of the government should not be estimated as proofs of the prisoner's guilt. Thus, though you find by the proclamation of the President (which doubtless, he thought, with a wise and upright intention, was required by the extraordinary circumstances of the times), that the disturbances in Northampton were deemed overt acts of treason by his advisers; and though this denunciation was followed by the march of a considerable army for the express purpose of subduing and apprehending the traitors, you will recollect, that you are to decide whether treason has been committed, from the evidence of the witnesses, and not from the opinions of the government. Again, great inconveniences have been experienced by many meritorious citizens, who relinquished the pursuits of business and the pleasures of domestic life, to assist in the suppression of the insurgents; but you will not allow the irritation and resentment proceeding from this source, to transfer from your judgments to your passions, the determination of the cause. Far be it from me to contend that outrages have not been committed, which are disreputable to the State or society at large, and to the character of Pennsylvania in particular; or to endeavor to shelter from the punishment of the law, the instigators and perpetrators of such offenses. Every citizen is interested, and is bound to assist in detecting, prosecuting and punishing the offenders; but every citizen, let it be remembered, is still more interested, that even the greatest criminals should only be punished in the manner and to the degree which the law prescribes. However we may differ on speculative points of politics abroad, however we may be disposed to approve or to disapprove the measures of administration, and however we may controvert or assert the constitutionality or the expediency of particular laws, all party spirit, all personal animosity, must be abandoned when we are called upon to act as ministers of justice; or we shall, in the



indulgence of a moment's vengeance, overthrow those barriers which are our own security, and the pledge of safety to posterity.

Whatever you may have thought, whatever you may have said, whatever you may have heard, in other scenes, must now be obliterated from your minds. The character of private citizens, with all the privileges of private opinion and feeling, is here exchanged for the character of public functionaries, with all the restraints of law and justice. Your opinions, as private men, will only be regarded according to their intrinsic merit; but your verdict, as a jury, will be forever obligatory, bearing all the authority of a precedent.

Though, then, a proclamation has issued, an army has marched, and popular resentment has been excited, we claim an unbiased attention; and, circumscribing your view of the subject to the evidence, we confidently expect a fortunate result. What has happened in England upon a similar occasion, we think will happen here. The British Privy Council announced a traitorous conspiracy to the British Parliament. The British Parliament declared that the party recognized and confirmed the charge of high treason; and thus, the whole weight of public authority in that country, legislative and executive, instituted a prosecution, which was afterwards conducted with the greatest zeal and talents, with such zeal and talents as the present prosecution has displayed. What was the event? A jury (that inestimable palladium) without fear, and without favor, examined and pronounced that no treason had been committed. I allude to the recent cases of Horne Tooke, and Hardy.

I shall, I presume, be excused, if I intimate to you some other disadvantages under which the prisoner's case labors; for, it is not merely necessary to produce evidence, to explain, extenuate, or refute the charge; we must guard your minds against any previous bias, any latent pre-determination to convict. The accused gentleman and his companions, you will recollect, are not upon their trial among persons with whom they have been accustomed to live. This is a disadvantage which every candid man will acknowledge. They are to

be tried likewise, by a jury, selected and returned by the marshal, the very officer who has been personally insulted, and whose appointment depends on the will and pleasure of the Executive magistrate, that magistrate by whom the offenders have already been described as traitors. I mean not to cast the least reflection upon the laws of Congress, nor upon the officers of the government; but to make a general remark on the defective state of our judicial institutions. The conduct of the marshal has, indeed, been highly exemplary throughout the transaction; and when, with such powers, he returned such a jury as I have the honor to address, he manifests an impartiality and independence of character that entitle him to the respect and plaudits of his country. Nor is it here that the prisoner's disadvantages terminate: but I hope, I believe, that never till this day, was the press employed in a base and sanguinary attempt to intimidate the jury and counsel from a faithful execution of their duty in a capital case! Since, however, the jury have been summoned; nay, since the court have been sitting upon this very trial, there have been the grossest, the most insidious practices in a public newspaper to warp your sentiments, and to deprive the unfortunate prisoner of the benefit of the best talents which the bar of Pennsylvania can afford. On the other hand, a gentleman, whose abilities we all respect, and whose long residence in the offending counties must greatly facilitate the progress of the prosecution, is associated without censure, and certainly without being answerable, in the duties of the attorney of the district. While our ignorance of characters and circumstances perplexes the defense, his accurate information and experience enable him to probe every witness to the quick, and forcibly to combine and interweave all the incidents of the transaction. But his motives are pure; for, if he does arraign, if he does convict, if he does punish, it is because his patriotism and public spirit enable him to soar far beyond the little affections of a neighborhood.

Gentlemen, in this situation we appear before you as advocates for the prisoner. I declare, that as far as my mind is capable of being impressed by a sense of duty, I feel a terror

lest anything should be left undone or unsaid which is essential to the cause; and, therefore, complicated as the discussion must necessarily be, accept, I pray you, my sentiments under the following heads.

First, I will endeavor to establish such points of law, as seem to me to be applicable to the facts which have been given in evidence.

Secondly, I will consider the general state of the discontents, and how far the rescue at Bethlehem was connected with the previous disturbances.

Thirdly, I will take a review of the conduct of the prisoner in particular.

*Mr. Dallas* here went into an examination of the law of treason, taking the same general grounds as those opinions maintained by *Mr. Lewis*, and thus proceeded:

Now, gentlemen, I challenge the prosecuting counsel to say, in what part of the evidence it has appeared, that these insurgents went further than to declare that the law did not please them; that, though they did not mean to compel Congress to repeal it, they had some doubts, and wished to ascertain whether it existed or not; to know whether the country in general had submitted to it; to know whether General Washington was not dissatisfied with it, and to see whether they could not get the assessor appointed by themselves. Under these impressions many irregularities occurred, but I ask the adverse counsel to point out, if they have discovered, through the whole course of the business, any insurrection existing, any traitorous design, till the meeting at Bethlehem; or whether, till that moment, the people of Northampton could be said to have been guilty of any crime?

We are told that the case of the Western Insurgents in 1794, is in point, and that the decisions upon the trials that then took place are precedents on the present occasion; but, with great deference, I declare that it seems impossible to bring cases more dissimilar into view, where violence has been committed in both. At this stage of the argument, however, I shall only remark, that whatever may have been the language of the judge who then presided, I am sure the attorney

of the district will be good enough to recollect, and candid enough to state, that the opposition, though in its origin excited against the excise law, was conducted with the avowed purpose of suppressing all the excise offices, and compelling Congress to repeal the act.

Let us for a moment, gentlemen, trace the motives of the people by looking at their conduct, not at large, but in the lawless scene at Bethlehem. What did they do? why they rescued the marshal's prisoners; but the moment they had effected the rescue, did they not disperse? Their whole object then was consummated; for, I must presume that they contemplated nothing farther, as I see them attempt nothing more; and yet the time was very favorable to accomplish a more extensive design, if it had ever been meditated. Men intending to compel, by every hostile means, the repeal of a law, when they had in their hands the obnoxious agents of that law (Mr. Balliott, Mr. Eyerly, the marshal and others), would hardly have let the moment pass without some effort to triumph in their advantage. It was, indeed, rumored to be their intention to dispatch Mr. Eyerly; but where does it appear? Was he not completely in their power? Was he not constantly in their view, though he incorrectly says that he was constantly out of their view? No: I repeat that the rioters, having accomplished the rescue, dispersed; and will you, under such circumstances, in a case of life and death, determine that they came to commit treason—rejecting the plain fact, and adopting a constructive inference? But if they proceeded no farther than I have stated, let us again look to the law of England, to define their crime, as distinguished from treason; and you will not cease to bear in mind that you must establish the distinction. Hale's Pleas, vol. 1, p. 133-4. Bacon's Abridgment, vol. 6, p. 513-4-5.

2. Having thus delivered my sentiments upon the points of law that arise on the evidence, I shall now enter upon the consideration of the second proposition—"the general state of the discontents in the Northern counties; and how far the rescue at Bethlehem was connected with the previous disturbances."

And here I find, gentlemen, that the source from which proceeds much, if not at all, of our political good, discharges, likewise, much, if not all of our political evil. I mean the business of elections. You will recollect the testimony of Mr. Horsefield. That gentleman, when he wished to give you a description of the origin of all the mischief that we deprecate, pointed his finger emphatically at the election of 1798. Now, I pray that I may not be misunderstood in the progress I shall make through the scene which is thus disclosed. Let it not be supposed, that I am depraved enough to justify the misconduct that has been exhibited, because I am firm enough to contend, that it did not proceed from motives directed to treason, nor lead to consequences that amount to treason. At the eve of our election, it is natural for the citizens of a free country to canvass what has been done by the public agents; to applaud the good, and reprobate the bad; and in doing this they exercise a right; nay, they perform a duty. No intelligent and candid man will say that the constitution of a representative republic can be preserved in a vigorous and healthy state, unless the people, from whom it derives its vital principle, are vigilant and virtuous in the exercise of the elective franchise. For this purpose they retain the right of opinion; and though they may use it upon mistaken, or erroneous grounds, if they use it fairly and peaceably, there is no power to control or obstruct them.

I ask, then, what were the ostensible causes of discontent? They will be delineated by the opposite counsel as spectres of the most visionary, yet most horrible aspect. But notwithstanding any sincere abhorrence of the manner in which the discontent has been manifested, I cannot admit that the causes did not afford a legal ground for exercising the right of opinion. For instance, the Alien and Sedition laws. They are a novelty in this country, and their novelty might alone attract the popular attention and displeasure. But were the inhabitants of the Northern counties of Pennsylvania the only dissatisfied citizens? Peruse the debates, examine the files of Congress, and you will find the most pointed declarations of the public opinion, the most unequivocal marks of dissatis-

faction, throughout the United States. Exercising the right of opinion, the people disapproved the laws, and the law-makers. Exercising the right of election, they endeavored to promote the success of those candidates who would regularly procure a repeal of the laws. Again: the stamp act was strongly objected to, and produced the nickname of "Stamp-lers," which was applied generally to the friends of government. Now, in my opinion, there cannot be a more convenient mode of taxation than an imposition on stamps; but that was not the opinion of the people of Northampton and Bucks. They had imbibed a prejudice against a stamp in the year 1775, and not considering properly the ground of American opposition to the tyranny of taxation without representation, they confounded the name with the principle of the law. I repeat that I do not agree with them, but I contend that they had a right to speak freely on the subject.

Again. The house tax was objected to; not from the real, but from the imaginary burdens which it imposed; for if it had been intended to devise a tax for the relief of the poor, at the cost of the rich, for the benefit of the country at the expense of the city, there could not, I think, be a more ingenious plan than the present law exhibits. The opposition must evidently, therefore, have arisen from misconception or misinformation. But if their opinion of the law was sincere, however erroneous, it is entitled to indulgence. The fallibility of the human understanding, and the frailty of our passions, must be respected in every wise and benevolent system of politics, or law. A man who honestly acts under a false impression of facts, may be pitied as a weak man, but he ought not to be punished as a wicked one. Then, the rioters were under an evident delusion, as to the principle of the land tax, the purity of the government, and the compensation of public officers. They had not the ordinary access to information, since our laws are published in English, and most of them only understood German: and being a question of property, they acted upon the first blind impulse of their avarice, proving the truth of Mr. Horsefield's observation, "that the Germans are fond of their money, and do not like to part with it."

But still there is a criterion which, in applying a rule of law, ought always to be regarded: I mean the moral character and mental attainments of the men who are arraigned. If a discontent exists, we cannot fairly expect the same mode of expressing it from illiterate, uncultivated men, the scattered inhabitants of a remote district, that we may reasonably exact from men of education and manners, formed by the luxury and refinements of a metropolis. These will take care, if they do express their discontents, to avoid personal indignity and legal embarrassments; while those without skill to ascertain the limits of the law, as without delicacy to respect the inviolability of the person, rarely act without being riotous, or complain without being abusive. Plain men, then, have but plain ways to manifest what they feel; and they ought not to be tried and condemned by a more perfect and, generally, a more artificial standard. A disturbance similar to the one under consideration is not uncommon in England; but the government, instead of entering prosecutions against the discontented, for treason, has sometimes thought it proper to acquiesce in the wishes of the people. We all remember the popular influence in depriving Lord North of the reins of government. The attempt of a minister (Mr. Pitt) to involve that nation in a war with Russia, was a very unpopular measure; murmurs and complaints reverberated through the kingdom, and, finally, he was obliged to abandon his project. The shop-tax was sanctioned by all the branches of Parliament; but it generated clamors so loud and so acrimonious, riots so numerous and so outrageous, resistance to lawful authority so daring and so injurious, that the government itself might justly be said to be assailed; and the act of Parliament to be repealed by force and intimidation; yet, not a single indictment for high treason was projected. Hence it is that I think risings of the people, like the present, should be viewed with the determination to punish, on account of delinquency, but, also, with the disposition to mitigate, on account of prejudice or ignorance. In a country where party spirit beats high, there should be peculiar caution on the subject; for, even in the present case, has not the joy testified by the triumphant

majority at the late election, been classed with the symptoms of popular discontent and hostility to the government? Nor will it be denied that there actually did arise in the minds of the people a serious doubt, whether the law was in existence or not; and although, I repeat, that ignorance is not a legal excuse, yet you must take into view the state of information, before you can understand the degree of guilt. Under this ignorance, in this state of doubt, can the refusal to permit the assessors to enter a particular township, be construed into a fixed and deliberate intention of levying war against the government? Though the law had been enacted, we find that the subject of the law had been brought anew before Congress, and petitions were sent in abundance, praying for a repeal. These discontented people might have supposed that a repeal was effected, or intended; though we, who were at the seat of government, knew the object of the revision was merely to amend, and not to rescind the law. At the meeting at Kline's (acting, probably, under the mistake that I have suggested), there was an express declaration that the people did not think the law was in force at that time. And here let me remark, that the prisoner, who is called the great parent of the discontents, was not present at Kline's, which appears to have been the first step in the opposition to the land tax. Such was the state of information at that period. Mr. Horsefield has said that there were general discontents prevailing throughout the country: but his allegation is too vague, too comprehensive, to be understood or acted upon. The citizens of a free government have a right, if they apprehend that a violation of their Constitution is intended, or if they think that any encroachment is made on the bulwarks of liberty, or property, to express their opinion; but is it practicable so to express that opinion as not to encounter from their political opponents the charge of discontent and sedition? How, in the present instance, was the popular discontent expressed? At first, petitions to the government were proposed, framed and subscribed. This was the result of Kline's meeting; and in this, I presume, no hostility, no levying war, can be discovered. At every subsequent



meeting, whether convinced by the assessors, or by the people themselves, the reliance on legislative redress was never abandoned; though, it is true, there was great intemperance of manner and of language. The assessors were sometimes interrupted in their journeys, and sometimes jostled in the crowd; and the unmeaning epithets of Stampers and Tories, were rudely applied to the friends of government. But, however censurable, where is the treason in such proceedings? A rioter and a traitor are not synonymous characters; and let us say what we please about nicknames and slander, the society that patiently submits to the scurrility of the Philadelphia newspapers, will never be disgusted or enraged at the indecorum or vulgarity of the Northern insurgents. But the insurgents went further; they intimidated the assessors, and is that treason? No; it is the very gist of the offense for which the sedition act explicitly provides. Is it not the very phrase of that act, that if any persons shall combine to intimidate an officer from the performance of his duty, he shall be deemed guilty of a high misdemeanor, and be punished with fine and imprisonment? Now let us go step by step through the evidence, and I defy the most inquisitorial ingenuity to discover anything beyond the design, and the effect, of a system of intimidation. Is there any actual force resorted to? No! I find the bridle of one assessors seized, and his leg laid hold of; but the man is not pulled off his horse, nor is he the least injured in his person. I find that a witness thinks that he heard the word "fire" given, and that he saw two men from a neighboring porch present their rifles at another assessor. Well, did the riflemen fire? No. They had guns; their guns were, probably, loaded; and if any thing more than intimidation was meditated, how shall we account for their not firing? But we hear a great deal of the personal jeopardy of the commissioners and assessors; and yet who of them sustained an injury? Mr. Chapman, Mr. Foulke and Mr. Childs, are, generally speaking, treated as men of merit and consideration; and, in particular, wherever the prisoner met them, they were respected and protected; as at Jacob Fries' and Roberts' taverns. To repel the plea for favor founded

on such correct deportment towards the officers, we shall be told that the prisoner was an artful man, that he was the leader; and it will be strongly urged against him, that he called on the officers to surrender the public papers. Of his conduct as a leader, I shall speak hereafter; and of his demand of the papers, it is surely sufficient to observe, that, in opposition to the sense of the rioters, and at the risk of his life, he returned the papers, privately, in the same state in which he had received them.

Having spoken of the assessors, I would wish, likewise, to review the evidence with respect to Mr. Eyerly, the commissioner, and Col. Nichols, the marshal.

(Here *Mr. Dallas* entered into an investigation of the evidence, to show, that although the people acted violently at the several meetings which Mr. Eyerly had called to explain the law to them; that although Mr. Eyerly accompanied the marshal in his whole progress for serving process, and that although he was conspicuously present at Bethlehem, no personal violence was ever offered to him, or to the marshal; and all the ill-treatment they encountered, amounted to no more than an attempt to intimidate them, but which they both declared was without effect. Mr. Dallas then continued as follows.)

And are we to be told, sir, that these acts without force, without any apparent object but to intimidate the assessors of a particular district; that distinct acts of inconsiderate riot and folly shall, when connected and combined, constitute a deliberate treason, by levying war against the United States? If no treason was actually perpetrated, if none was intended when the transaction occurred, I insist, that nothing previous to them, nothing *ex post facto*, can make the prisoner a traitor; the intention at the time must have been treasonable, or the act can never be punished as treason.

Let us now, however, proceed to inquire into the circumstances of the rescue at Bethlehem, and its connection with the previous disturbances. I think the evidence is strong in

support of the assertion, that the sole, independent, consummate object of the assembling of the people at that place, was to rescue these prisoners. Is there any satisfactory proof of a combination between the people of Northampton and of Bucks? I know that an expression is said to have escaped the prisoner, that, in this general discontent with respect to the land tax, certain persons of a part of Northampton would join the inhabitants of Lower Milford; but let the foundation of his opinions be tested by the facts, and it evidently arose, not from negotiation, conspiracy and compact, as the prosecution supposes, but from a general knowledge, which he possessed in common with thousands, that the land tax was unpopular throughout the adjacent country. It is enough, however, for the defense, that no combination or correspondence is proved; since the rule declares, that in legal contemplation, what does not appear and what does not exist are the same. You do not find the people of Bucks attending any meetings but in their own county, nor entering into the County of Northampton at all, previously to their appearance at Bethlehem.

Gentlemen, it might surely be expected, that a concerted insurrection for treasonable purposes, prevailing throughout the three counties of Bucks, Northampton and Montgomery, and cemented by common interests and passions, would have been inspired and conducted by one common counsel; but is there the slightest proof of such a co-operation? I am aware of the communication made by Captain Staeler to the son of Conrad Marks; but the communication itself was merely accidental, and amounts to nothing more than the request of one individual of Northampton to an individual of Bucks. I am aware, likewise, that a message was received at Quakertown (as one of the witnesses says), mentioning the arrest of the Northampton prisoners and inviting the people of Bucks to assist in rescuing them. Who brought this message, and to whom it was delivered, I don't recollect; but it seems, that a compliance was resolved on, and a paper expressing the resolution, was prepared and signed by Fries, with a number of other persons. But was the object of the invitation, or of the

resolution to comply with it, treason, or rescue?—to commit a riot, or to levy war against the United States? I repeat, that the sole, independent, and exclusive purpose, was to rescue a particular set of prisoners.

Now if, in the previous part of this transaction, nothing has struck your minds as traitorous in the acts or the intention of the people, I beg you to follow me, gentlemen, with strict attention, to a consideration of the object that was actually effected, and the means of effecting it. The object was to obtain a rescue; a rescue was effected, but it was effected with circumstances of military array; will this alter the original character of the riot? No, sir: if the people did not repair to Bethlehem with a traitorous intention, their arms and military equipment will not convert them into traitors. As on the one hand, I grant, that the circumstance of military array is not necessary to an act of treason, if the intention is traitorous, so I insist, on the other hand, that the circumstance of military array will not constitute treason, without such intention.

*Mr. Dallas* entered into an investigation of the evidence in relation to the assembling of the people, their march to Bethlehem, and their conduct there. In the course of the detail, he endeavored to establish, that the sole object of the rioters was to rescue the prisoners; that no injury was offered, or intended against the marshal, the commissioners, the assessors, or the posse comitatus; and that although the prisoner was forced into a conspicuous station among the rioters, his conduct had been marked with civility towards the public officers, and a solicitude to avoid the effusion of blood.

And here, permit me to remark, that if the conduct of John Fries was such as to justify his being selected as a subject for capital punishment, I cannot see the policy or justice of the selection, nor forbear from deprecating the consequences of the precedent. A good man may sometimes affect to join a mob, with a view to acquire and to exercise an influence in suppressing it; or an intelligent and temperate man may, for a while, be associated for an illicit purpose, with a furious and ignorant rabble, who will naturally look up to him as a leader; but, in either case, the power and the disposition to

avert or to limit outrage, will be dangerous to the prominent individual who displays them, and his only safety is in mingling with the crowd, whatever may be the direction or the devastation of the storm!

Gentlemen of the jury, I have now gone through two of the general propositions into which I divided the consideration of the defense; and in the course of my observations, I have anticipated much that related to the third proposition, the particular conduct of the prisoner. I should here, therefore, break off, as I feel that my strength, and I fear that your patience are exhausted, but that the proclamation of the President demands a moment's further attention. By the laws of the United States it is provided, that, under certain circumstances, the President may call out the militia to suppress an insurrection, having previously published a proclamation requiring the insurgents to disperse. This proclamation is obviously in the nature of an admonition; and if the admonition produces the effect, I ask, whether in the present, as in every other case, it ought not to produce impunity! Then I argue, on general principles, that if the rioters did peaceably retire to their homes upon this authoritative warning, they ought to be sheltered from punishment for any offense previously committed. Nor is the argument without a sanction from the positive authorities of the law. (1 Hale, 138.) And the court will recollect, that the principle is incorporated into the statute, which is usually called in England, the riot act. There must surely be some object in requiring the President to issue his proclamation; and the one which I suggest is equally benevolent and politic. On the present occasion, it produced an immediate and decisive obedience to the laws. Besides, when we recollect that the President has the power to pardon offenses, to discontinue prosecutions, and to grant a general amnesty, as in the case of the Western insurrection, why may we not consider the proclamation as emanating from that attribute of mercy, since no specific formula is prescribed, by which its exercise shall be expressed or announced?

*Mr. Dallas* then proceeded to point out the differences in

the nature, progress, and turpitude, of the Northampton insurrection, and of the Western insurrection (2 Dallas' Reports, 349); and analyzing again the case of Lord George Gordon, he contended that upon that authority alone, the prisoner ought to be acquitted. In the case of Lord Gordon, the direct, the avowed object, was to obtain the repeal of a law; and as petitions and remonstrances were unavailing, a body of forty thousand men were convened and marshalled to surround, intimidate, and coerce the Parliament. Riot, arson, murder, and every species of the most daring outrage and devastation, ensued; and yet, the only prosecution for high treason was instituted against the leader of the association; and that prosecution terminated in an acquittal. View, then, the riots of Lord George Gordon in their origin; estimate their guilt by the avowed object; aggravate the scene with the contemporaneous insults and violence offered to the persons of peers and commoners; and close the retrospect with the horrors which the British metropolis endured for more than eight days; and then say what was the guilt of John Fries compared with the guilt of Lord George Gordon? what is there in the English doctrine of treason that has justified an acquittal of the latter? what is there in the American doctrine of treason, that will justify a conviction of the former?

Gentlemen, I can proceed no longer. The life of the prisoner is left, with great confidence, in your hands. There are attempts to make him responsible, under the notion of a general conspiracy, for all the actions and all the words of meetings, which he never attended, and of persons whom he never saw. But this is too harsh in a case of blood. It is inconsistent with the humanity, the tenderness of life, which are characteristics of the American people, and especially of the people of Pennsylvania. Nor is it called for by the policy or practice of those who administer our government. I believe that to the chief magistrate, to every public officer, to every candid citizen, it will be a matter of a gratification, if after so fair, so full a scrutiny, you should be of opinion that treason has not been committed. Such an event will by no means ensure impunity to the delinquent; for, though he has

not committed treason, though the punishment of death is not to be inflicted, the violation of the laws may be amply avenged upon an indictment of a different nature. The only question, however, now to be decided is, whether the offense proved, is like the offense charged, treason against the United States. The affirmation must be incontestably established as to the fact and the intention, by the testimony of two witnesses to the same overt act; but remember, I pray you, what the venerable Lord Mansfield stated to the jury on Lord Gordon's trial, remember that it is enough for us in defense of the prisoner, to raise a doubt; for, if you doubt (it is the principle of law, as well as of humanity) you must acquit:

#### THE WITNESSES FOR THE PRISONER.

*John Jamieson.* Some time after last February court, John Fries came to my house; had heard there was to be a meeting at Kline's; asked him whether there were many people there, and what they had done. He told me there were, and they had agreed not to allow the assessments to be made in the township as yet; the reason was they did not know whether there was a law passed on it or not; told him I really believed there was, for though I had not seen it myself, I had heard of it. On sixth March called at Jacob Fries; a parcel of men came there, some with arms, and some without. They called for liquor freely. They made inquiry whether the assessors were going about the township or not; they agreed to go up to Quaker town; Jacob Fries and I concluded that we would ride after them; we went to Daniel Penrose's; we saw Mr. Rodrick; he appeared to be much frightened; asked him what was the matter; he told me they had

caught Foulke and Childs, and that he was afraid they would kill them, and insisted on my going back to try to prevent them being hurt; went to town and was told they had Foulke in the stable; he came into the house; told him it was a pity he should assess the township till they were more reconciled. I thought the best way to quiet the people was to show them the small assessments he had made, and promise not to go about again till they were satisfied; said he was willing to do that. Conrad Marks walked toward us with a sword in his hand, and said to Foulke: "What! I hear you are going about this business again! did not I tell you not to do this business? but I cannot tell you in English like as I could in Dutch; but it is for the sake of those few dollars that you go about this business." Foulke answered he did not do it for the sake of the money. Marks answered: "Did I not tell you that if you could not do without, come to my

house and I would keep you four or five days? but if you had to do this for half a crown a day, the devil would not send you about the township;" told Marks what I had advised Foulke; he said if he would do that, he would use him like a gentleman; saw John Fries looking over some papers. After the affair at Bethlehem, John Fries came to me and told me the circumstances, much the same as was related by the marshal; said he did not know what to do with these Germans, for that they had got it grafted in them that General Washington was opposed to this law, and that, so poor a man as he was, he would not grudge half the expense of a man to go and get his opinion on purpose to satisfy the Germans. There was a meeting called at Marks' on the following Monday. There were 150 people or more from the three counties; was one of four chosen from Bucks, with George Kline, David Roberts and Conrad Marks. Dr. Baker, Squire Davis, and I think Squire Jarrett were some. We unanimously agreed to recommend to the people to desist from opposing any public officer in the execution of his office, and enjoined upon the citizens to use their influence, to prevent any opposition, and to give due submission to the laws of the United States.

On returning home, called at Frederick Henny's, and desired him to draw out some German advertisements, and send them over towards Marks', to desire the people to meet, and consent to let Clark go about. At the time of appointment, the people met at Mitchel's; there were

about forty there. John Fries and Frederick Henry was there. The people in general agreed to let Clark go about; believe Fries and Henny did not vote; saw Fries again a few days before he was taken. He told me he had heard a report which troubled him, that he was collecting up men to assist the French. He said, "Damn the French; if they were now to come to invade this country, so old a man as I am, I would venture my life against them; but I want nothing to do with them."

Fries said that if he was called upon, or summoned, he would come forward and deliver himself up.

*Jacob Huber.* Was at the meeting at Conrad Marks'. It was after the proclamation, and we were choosing the men to meet in the committee; Fries says: "Now, Jacob, you see the error we got into by going to Bethlehem." I answered him, that the assessors would have to go about and assess the houses; he said, they should not assess his before he gave them a dinner, then they might take the assessment of his house; and "if I am not at home," said he, "my son will give them a dinner." After this meeting, the general situation of the township was quiet. John Fries was as peaceably and quiet as any man could be; never afterwards heard of the least opposition.

*Israel Roberts.* After the proclamation arrived in our neighborhood saw John Fries; told him that I wanted to have some conversation with him relative to it; asked him whether he had rightly considered this mat-



ter, whether he had not run himself into danger inconsiderately, and told him the consequences I thought might attend it; said he never had considered it so much as he had within a few days before; he had not slept half an hour for three or four nights, and that he would give all he was worth in the world if the matter was all settled, and he clear of it; if the government would send for him, he would go with him, even if a little child was sent. After the proclamation, there was still some little opposition to the law in Milford township; do not know that there was any made by the prisoner.

There was a meeting at Mitchel's to choose an assessor; Fries was there; said he would have nothing to do with it. I heard him say he did not believe it was an established law, and therefore he was determined to oppose it.

At the meeting at George Mitchel's, at which Mr. Foulke and Mr. Chapman were present for the purpose of explaining the law, there were a number came up in uniform, and armed with a flag and liberty on it. They came into the house and appeared to be very much opposed to the law, and in a very bad humor. I proposed to read the law to them; one of them said: "We don't want any of your damned laws, we have laws of our own," and shook the muzzle of his musket in my face, saying: "This is our law, and we will let you know it."

Saw Fries on the evening of 5th March; asked me if they had assessed my house; told him they had; he then added that he had

forbade them to come into the township, as he did not believe it was an established law, and others should be gone through with first. He seemed very much opposed to the law. He did not express his opposition to any other law that I heard, but to the law for assessing houses; took it that he did not believe the law had ever passed; he seemed to doubt of its being established.

*Everhard Foulke.* Coming from the house of James Chapman with the other assessors (John Rodrick and Cephas Childs), opposite Enoch Roberts', saw the prisoner and a number of others with their arms; don't know that he had any, but the others had; got nearly to the other tavern, David Zellers', when a number run out and cried "Stop!" John Fries came over and told me he had told me yesterday that he would take me today, and he was now come to do it. Captain Kuyder seized my horse by the bridle, and a number of others came round me. Some of the people there (Jacob and John Huber) took Kuyder off, and he then seized me by the foot, and endeavored to dismount me, but he failed. Fries came up and said: "Foulke, you shall be taken if you will get off; there shall no man hurt you." I rode up to the stable, got off, and went into the house. When in the room, which was very thick of people, the prisoner came and demanded my assessment papers; told him that I did not like to give them up; he told me not to hesitate, but to do it. I gave them to him. Fries gave me the assessment papers again unhurt, and told me that he

had used me better than I deserved, and that if I had a mind I might return him to court, which I had before threatened. He went with me to the bar, took me to my horse through the mob, and held the bridle while I got on,

and I rode off. I received no injury. The prisoner said or thought he had transgressed the law in such a manner as to endanger his life, and that I might return him if I would.

MR. EWING FOR THE PRISONER.

*Mr. Ewing.* You are now, gentlemen of the jury, in the discharge of the most important duty which possibly has, or ever can fall to your lot as members of society. This is a cause of the greatest magnitude, of the first impression. Its importance is derived not only from a consideration that the life of the prisoner is now at stake, but also from the precedent that your verdict will establish in similar cases in future. From this view of it, it claims the highest and most serious attention that can be bestowed upon it.

When I address you on this occasion, I feel diffident lest my ideas should not be clothed with that perspicuity or clearness that I could wish, or my sentiments delivered with that ease or elegance that might insure success. I shall rely upon your goodness to forgive any inaccuracy of style or sentiment that your penetration may discover in my address to you.

When I address you on this occasion, it is with an anxiety of mind which I never before experienced, when I reflect upon the possible issue of this cause with respect to the unfortunate prisoner at the bar.

The situation of the public mind, now roused to resentment; the place where this subject is made matter of inquiry; together with the prejudices that may exist against the defendant, all conspire to form strong obstacles to the defense which I shall attempt on this occasion. But when I consider your characters, gentlemen, I am fully persuaded that you will suffer no circumstances of this kind to bias your impartial judgments, to destroy that inflexible integrity which characterizes you, or prevent this defendant from receiving from your hands (which is all he asks) a fair, a candid, and an im-

partial trial; that you will hear his cause under every presumption of his innocence, until the contrary is proved by the most incontrovertible evidence. That it is essential to the very existence of every government; that it is essential to the preservation of life, liberty and property that offenses should be punished, and that the crime of treason, the highest that a member of society can commit, is what I will admit; but I contend that it is equally essential to the existence of a government, and to our security as members of it, that every man indicted should have a fair trial; to have the offense defined with certainty, and proved in such a manner as to leave no possibility of doubt on the minds of the jury.

That this man has been guilty of a flagrant violation of the law, an offense for which he deserves to suffer, and which the good of society requires should be punished, is what I readily admit; but I do contend, and I assert with confidence, because I think the law will bear me out, that no act the prisoner has committed can be construed treason by the most rigid or strained construction of law.

Gentlemen, permit me to observe, that in proportion to the nature and magnitude of an offense, so ought the evidence to be. As the accusation against this man is of the deepest dye, as it is the highest possible offense against the laws and government that he could commit, so should the proof of it come from the purest sources, and be of that nature as to establish the crime beyond the possibility of a doubt.

He is indicted for the crime of treason. Happy for us that we are not now left to the construction of judges, to the opinions of men of any kind, or we might be led astray in a variety of instances, and at time introduce accumulative treason. The people of this country, knowing the magnitude of this object, and the propriety of good security against such constructions, ingrafted into the Constitution the definition of the crime, and transmitted it to us unimpaired. Congress recognized the constitutional definition, by ingrafting also the very words of the Constitution into the act for the punishment of crimes; they have there prescribed the punishment; they have said that the perpetrators of this crime shall suffer

death. We are now to consider how far the defendant is guilty of treason, as laid in the indictment. I had meant to have gone more largely and fully into this subject from the authorities of law writers of eminence, but my learned colleague has so ably, in so masterly a manner handled this cause, that less remains for me to do. I shall endeavor to show you what is to be understood by levying war against the government of the United States, and think I can rest on that ground with safety, to prove to your satisfaction that the prisoner has not been guilty of the crime of treason.

The defense rests upon three grounds.

First. That he has not been guilty of the crime charged in the indictment.

Secondly. If he has been guilty of any crime at all, the Act of Congress has sufficient defined it, and prescribed the punishment not to be capital.

Thirdly. I contend that the proclamation of the President should operate as a pardon to take off the guilt of actions done previously thereunto, if not continued in.

JUDGE IREDELL said that a plea must be put in if that was insisted on, but the prisoner must plead guilty to plead pardon. The proclamation was read by Mr. Ewing, in which, he observed, there was no pardon promised.

*Mr. Dallas* said he had begun speaking on this point before, but was interrupted from explaining his idea. He thought there was much difference between an assemblage before and after an admonition to disperse. It doubtless would have been treason had they continued in arms, but their future actions put a construction upon their past actions, and proved that they were guilty of riot and not treason.

*Mr. Ewing.* This opposition arose from ignorance; they did not know that the law was in force; and the first time they knew that, was by the Proclamation, when they actually did disperse and submit to the law.

The prisoner at the bar is not guilty of the treason laid in the indictment; for, first, there must be a traitorous intention; and, secondly, that intention must be carried into effect. In order to prove that, we must trace his conduct through Bucks county, and then proceed to Bethlehem, where the act of trea-

son is said to have been committed. In order to discover what is meant by levying war, we are obliged to resort to the authority or decision of English courts on the statute of Edward the III.: but though everything that has been done there is not to be considered as a proper precedent for us here, yet there are some rules and constructions in England that will apply to particular cases here. Wherever a set of men take up arms to oppose themselves to the government generally, to subvert the laws, or to reform them, in that case they are said to levy war against the government. The great criterion to distinguish what amounts to this crime is the *quo animo*, or the intention with which the act was done. The object must be of a general nature, and not an assembly to do a particular act; this would not be treason. I shall now show, by the conduct of the prisoner, that his views were not of a general nature, and that it was by no means marked with that degree of malignity which the counsel for the prosecution have represented. You will consider that the residence of the prisoner was remote from the seat of government, and from that source of correct information which, as a member of society, he ought to have received, whereby to regulate his conduct. The people with whom he conversed were unacquainted with your language, warmly, and perhaps superstitiously attached to old established laws and customs of the place where they resided. Having been accustomed to be taxed and assessed by men of their own choice; men whose conduct they had a right to scrutinize, and whom they had used to bring to account, you need not be surprised that these people would at least hesitate at admitting innovations into their customs. The ideas which struck them naturally were, "From what source can this law arise, that should send a stranger into our townships to make assessments—a right which, exclusively, as we think, belongs to us?" They did not feel such prejudice against this law, considered as to its effects, but from the manner of its breaking upon their view. The introduction of this new principle alarmed them, but they assembled, not to oppose the law, but to gain time for information of the real existence of it. Under this delusion they labored, because

they had not the advantage we have of enjoying information, and the illiterate state they were in operated as a great source of their opposition. This ignorance and delusion were peculiarly manifested throughout all their conduct. Their first meeting was held to consider whether it was a law or not. Not being satisfied about it, and disappointed in their information, they met again, in order to tell the assessors not to come about their township to make the assessments until their doubts were removed. The assessors went on, however, and all this while the people were enveloped in darkness. They warn the assessors; they tell them, "We don't want to repeal this law by violence." No; if they had, arresting the assessors would not have done it; they must have gone to a higher source; and if they had gone there with a determination to repeal or oppose it, the act might have received the stamp of treason. I deny that they arrested any of the officers of the government in the execution of their duty. We have repeatedly asked upon what authority these men acted. We have asked, and have not obtained satisfaction, and we therefore presume the authority does not exist; and where there is no law, there is no transgression. But suppose they had produced their authority, to what would their opposition have amounted? To a riot, and no farther. What course did Fries take in this scene? Humanity and tenderness, wherever his interposition was necessary, and he was present, characterized him. So far from subverting the government; so far from preventing the execution of its laws; so far from injuring or punishing these assessors while entirely in his power, he prevented the very people who were with him from doing those acts, and he himself was industrious to release them, and lead them into a place of safety. If conduct like this is to be construed into the crime of treason, what act, I ask, will not by and by? If this is treason, it is unhappy for us, for thousands in the United States have been guilty of the same thing. Because a law exists, must we acquiesce implicitly? have we not a right, as freemen, to think? have we not a right to object to it? It is impossible that we should be all of one mind with respect to the beneficial consequences of a law;

some difference of opinion will necessarily exist. The opposition was manifested in different places, but it was all to the same law. But the opposition did, in no instance, amount to a traitorous intention, nor was it ever manifested in their conduct from the beginning to the end. I ask you, if Fries ever took any active part in it, so as to distinguish him as their leader. It has been declared that he opposed the law, and likewise that he took men to Bethlehem to rescue the prisoners, but we do not find there was any command given. There was a difference of opinion on their way, whether they should go to Bethlehem or not. If he had commanded these men, and had intended to levy war against the government, some of them would not have returned; but he would have led them on to the object without consultation. Trace him towards Bethlehem. There were several who could not pass the bridge, because toll was demanded. When he came up, he said, "Count my men." No doubt he meant only the men of his own company, because we do not hear that he paid for more than his own. It does not appear that he had any communication whatever, informing him that such a party were to meet there that day, much less can it be imagined there were any treasonable communications. He went up with his men; but we find, while another company formed before the house, his men stood aloof. They did not form there in the ranks, nor did they come there for that purpose. The consideration that some of their country people were taken prisoners, and they thought it was unconstitutional and oppressive for them to be taken to Philadelphia to be imprisoned and tried, induced them to insist upon the rescue. What did they say? "We will bail them. If they are guilty, they ought to suffer." Bail is refused. The marshal could not have granted that request, but they did not know that. When they found this, their proposal, was rejected, they determine they will have the men. Then John Fries appeared. A man who had used the assessors respectfully. A man whose character was that of humanity. He was chosen to go in to the marshal to demand the prisoners. One said he should be commander of them; but it does not appear that he did take the command

at all; but we hear of two others who commanded on that day. Fries went in and conversed on the release of the prisoners with the marshal, who, with great firmness, said that they must be taken from him. He went out again, and the men being pretty warm, he checked them. Went a second and third time. All his aim was to prevent the shedding of blood. He pledged himself to the marshal that no harm should come to him from him or his company.

If the object of these people had been of a general nature, men so obnoxious in the county as Balliott, Henry, and Eyerly would not have escaped their vengeance or resentment, when they were so much within their power. Had their conduct been stamped with treason, they would not have been satisfied with rescuing the prisoners. The officers would have suffered; but not one, we find, was hurt. One strong trait, worthy your observation, is, that their view in going to Bethlehem was not to prevent the operation of the law, but simply to rescue the prisoners; and in this their conduct cannot amount to more than a riot and rescue. An offense defined, as well as its punishment, in an Act of Congress. As the overt act must be laid in the county where the offense was committed, and if it is true that treason was not committed at Bethlehem, where shall we look for it? The gentlemen will not attempt to prove, I presume, that the beginning of the treasonable act was in Bucks county, and its completion at Bethlehem. But Bucks has nothing to do with the present indictment at all, and ought not to be brought into view.

*Mr. Ewing* then referred to Foster 210, and 1 Hale 143, and Lord George Gordon's case, each of which, he said, far exceeded the case of the prisoner at the bar. But, he observed, as the time and patience of the jury, to which he felt himself so much indebted, had been so severely tried already in this lengthy trial; and as the defense had been so ably handled by Mr. Dallas, and what remained would be, he had no doubt, well conducted by the justly acknowledged great talents of another learned advocate, he should forbear enlarging. The verdict you give, gentlemen, said he, will not only be of vast moment to the prisoner, but will also establish



a precedent for future similar cases, and it will be to your immortal honor if you preserve and decide with impartiality and firmness; while, on the contrary, it will be a source of shame and disgrace if you do otherwise, through the influence of prejudice or the operation of external circumstances. I can safely trust the life of my client in your hands, under a consciousness that those feelings of humanity, and a just estimation of the evidence, will outweigh all other considerations, and thus will your righteous verdict gain you the gratitude of your country, the approbation of your own consciences, and the warmest thanks of the defendant.

MR. SITGREAVES FOR THE PROSECUTION.

*Mr. Sitgreaves.* I acknowledge the propriety of an observation which dropped from one of the counsel for the prisoner in the course of his address to you: that is, that those who are concerned for the prosecution in criminal cases should not endeavor, by their eloquence or ingenuity, to divert the attention of the jury from the truth, or to stretch that truth so as to give them more unfavorable impressions on the facts than they will bear. This, I must acknowledge, would have been unnecessary advice to me, because the views I shall be able to take of this subject will be but feeble and imperfect. In the course of my limited and short experience, I have been but little conversant with criminal courts, and have paid but little attention to the criminal code, and never have been engaged in a case so important as the present, my public duties having, for some years past, drawn me from the bar. It may not be wondered, then, if I have not been able to bring into this court talents equal to meet those called to the assistance of the prisoner. I must therefore say I shall not be able to do justice to the case. I confess I feel a desire that those persons who have been guilty of this second outrage and disgrace brought on the State of Pennsylvania may feel the punishment the law inflicts. I hope you and every one who hears me will join in this sentiment, for on it hangs much of our peace and security. I have no objection to going

still farther. My lot is cast in that part of Pennsylvania where this unfortunate circumstance occurred. I feel particularly for the good order, peace, and prosperity of that part of the State; but I have unhappily seen it in such a situation that all the harmony of society was destroyed; and if I were not to feel a strong desire that peace, harmony, and good order should be restored, I should be destitute of humanity; for we all know that crimes can only be prevented by inflicting suitable punishments on the delinquents. I wish, gentlemen, that the law should be executed against those who were criminal; but when I say so, let me not say that I wish the prisoner at the bar to be executed. No: my earnest wish is that the general good of society may be procured. This man must be tried by the evidence that is brought against him, and upon that alone he must stand for his guilt or innocence.

Having said thus much, I begin now to premise one or two things which I think should be altogether set aside, but which have been much insisted upon. You have been told that the prisoner appears here on the charge of treason, under all the disadvantages of denunciation by the President of the United States in his Proclamation. Any of the assertions of that Proclamation are not to have weight on your minds, nor will it operate against the prisoner. He is to be tried by the evidence only, and you are not to regard anything you have heard out of doors before this trial commenced. Nothing should operate to doom the prisoner to a harder fate than the law, supported by fair testimony, provides. It is also as true, that nothing contained in that Proclamation should operate to the benefit of the prisoner: if it should not convict him, no more should it acquit him. The analogy which has been drawn does not exist between this Proclamation and the Riot Act of England, as you have been told; but even if it did, the inference would not be just. You were told that all who disperse on the reading of that Act are pardoned for crimes previously committed. It is not so. But more of that presently. The Proclamation of the President was issued for one purpose, and the Riot Act, in England, is read for an-

other. The President has no authority to call forth a military power but under certain circumstances. Wherever a combination should form which is too strong for the civil power to quell, then the military may be called in to aid the civil, but with a humanity intending to prevent the effusion of human blood, and to call out military force as seldom as possible, the law has provided that a Proclamation shall be previously issued, that the offenders may disperse peaceably to their homes; but there is not a syllable about pardon in it. The President has the power to pardon, it is true, but he has not done it by that Proclamation.

The Riot Act, which passed in the reign of George I, was enacted in order to prevent tumultuous assemblies: if people refused to depart within one hour after it was read, they were guilty of felony, for which they were to suffer death, although the offense before was only a misdemeanor, yet the refusal to depart makes it felony; but it cannot be pretended that any such departure excused them from the riot, but, on the contrary, prosecution and conviction frequently take place for that crime, although they should disperse; and therefore it does not affect the merits of the case. The proclamation is as a blank paper before us, and therefore we must examine this case upon its own independent merits.

Gentlemen, in summing up this case on the part of the United States, the method most natural to adopt is,

First. To consider the law as relating to this subject.

Secondly. What was the amount of the offenses perpetrated at Bethlehem: and,

Thirdly. Inquire whether the facts produced in evidence are such as to convict the prisoner, and make him guilty of the charge in the indictment as applying to his particular case.

First, with respect to the law on treason. I should have expected it was so well understood that there would have been no difference amongst us, however we might differ on its application to the prisoner; yet unfortunately there is, and we must endeavor to meet those objections. The statement which was made to you at the opening by myself, and a state-

ment by the attorney of the district, I believe to be correct: I am confirmed in that opinion, and have no doubt it will be given to you by the court in the charge as correct. We are not at this day to distract ourselves with theory: The law of Edward III of England, called by some "the sacred statute," and by others the parliament who enacted it is called "The Blessed Parliament," that law and our Constitution have adopted the same words. The judges in England, as eminent for their patriotism, as eminent for their tenderness, and as eminent for their ability as any ever were in this country, have solemnly settled this particular in a variety of instances, and unfortunately, young as this country is, there has been the necessity for a court of the United States for this district to settle the principle likewise. The adjudication under this statute were made by men all well known for their love of liberty. We have no need to conjure up a different exposition, or different form of construction, than what has already been admitted in both countries: indeed, it is what cannot be shaken at this day. It is, that all insurrection by a multitude of people with intention to usurp by violence or intimidation the lawful authority of the government in matters of a general and public concern, in which the insurgents have no interests distinct from the rest of the community, is treason. From the best consideration I have been able to give the subject, I have formed this definition, which I believe comprises the whole that can be said about it, and I believe no more: I think this assertion will appear to be justified by the best authorities. If this description is just, the offense is clearly settled, and amounts to "levying war against the United States." In the most essential parts, I think this rule has been settled by the counsel for the prisoner.

The intention, which constitutes the gist of the offense, is proved to have been to some general object; if the intention was to gratify some private concern or interest, even if there be all the apparatus of war, as guns, fifes, drums, etc., whatever violence should be committed under it, it cannot amount to treason, because the intention is not to

a public matter, whatever other crime it may amount to, and whatever enormities may be committed. This may be the case, in order to gratify some particular passion, or some particular interest. It is the intention, which distinguishes treason from other crimes: Riot is generally much like it, but not being of a public nature, is only a misdemeanor: Treason, on the contrary, is the greatest crime known to the laws of any country. Lord Mansfield, at the trial of Lord George Gordon, expresses the same opinion. If this is a true position, it is certainly an irresistible inference, that insurrection for the purpose of suppressing and preventing the execution of a public law, is to prevent or obtain a public object, and of course must be high treason within the rule of our Constitution. Yet this has been repeatedly denied by the gentleman to be high treason; nay, he even went on so far as to say, that in England no such thing had taken place; he says it must be a combination to oppose all the laws; or, at least, to force the repeal of a law. Gentlemen, I think I have stated enough to convince you that this is erroneous: If treason is the unlawful pursuit of an object of a public nature, then the suppressing of a public law is treason. But I would not have you rest on my definition, if I cannot bring you full proof in favor of it. See 1 Hawkins, Chap. 17, Sec. 25. 1 Hale, 133. And this position is confirmed still further by a precedent of our own. 2 Dallas, 346, etc. I consider settles the question beyond all doubt, and it ought to rest so forever, the decision was so serious and solemn in both countries. I shall assume this as an acknowledged point throughout the whole of my inquiry. I should have added the opinion of Mr. Erskine, in Lord George Gordon's trial. Speaking on the treason statute, he says—None of them have said more than this, that war may be levied, not only by destroying the Constitution, or the government itself, but by assuming the appearance of war, to endeavor to suppress a law which it has enacted.

It is certain that British cases go much farther, and if it was necessary, and the case required it, it could be justified by decisions in England upon points infinitely less strong

than those I have quoted: points which were settled at a very early period, which neither the parliaments nor the courts have ever interposed to change. Cases of public grievances, whether real or pretended, whether they grow out of law or out of practice, as pulling down all enclosures, etc., which are the invasions of private right, from its universality—is high treason. Again, usurping the powers of the government by pulling down all bawdy houses, is high treason. The case referred to by Mr. Bradford, in Mifflin County, was, that a particular judge was driven from the bench: they did not oppose the sitting of the court, but they had a resentment against the individual, and therefore the prosecution was for riot. This will assist us in our farther inquiries upon the present occasion. This crime is said not to be treason, but a rescue and bare obstruction of process, and within the sedition law, or within a clause of the penal code, and therefore not treason. But whatever nature an offense may be of itself, if it is accompanied with this particular act of treason, the act becomes treason: I willingly admit that a rescue of prisoners may be without treason: a person may be willing to risk the law rather than his friend should suffer, and may therefore rescue him; this would be but misdemeanor: If ten men in arms go to an officer and rescue his prisoner, if it be done in a private manner, it is no more than a misdemeanor; but if these same ten men in arms go from motives of a public nature, then it becomes treason. The intention, therefore, makes the crime to differ.

It is said farther, that the legislature of the United States have passed a solemn opinion upon it, and that they have called it no more than a combination of certain facts; a rescue, etc., against which it has provided; and therefore it cannot now be called treason. I think this received a good answer by Judge Wilson, 2 Dallas, 351, and the objection was solemnly overruled by the court. The Sedition Act was not made at that time, to be sure; but if it had, there can be no doubt but it would receive the same answer, and meet the same fate by this judge if read in objection. But the first section of the Sedition Act describes a different sort of combina-

tion, and is not levying of war. There must be of necessity a conspiracy in levying war, but there may not be one in an unlawful combination.

JUDGE PETERS. Whatever the crime would have been without a treasonable intention, with a treasonable intention it would constitute the overt act.

*Mr. Sitgreaves.* The cases in the books are strongly demonstrative of this particular. In Benstead's case (Foster, 212), "certain unpopular measures having passed in the council, the odium was thrown on the Archbishop of Canterbury. A paper was pasted up in London, exhorting the apprentices to rise and sack the archbishop's house at Lambeth, and accordingly some thousands went with a declaration that they would tear the archbishop in pieces."

It was not attacking the individual, but the officer, that became high treason. The same with respect to the attack on General Neville's house during the Western insurrection; the attack on him was, because he was an officer, and therefore being upon the office and not the man, it was upon the government, and high treason.

Such is the general opinion of treason: the great inquiry will now be, what was the intention with which the offense at Bethlehem was perpetrated? It is allowed to be a rescue; it is conceded also that there was an obstruction of process: If it was so, it was a part of the general system which, being of this public nature, obtains the magnitude and operation of treason. Before I go into the examination of this, I will make an observation on what has been said: that the overt act must be proved in the county where it is laid. I heard this position, but I did not discover any application of it, and therefore I am at a loss to know how to treat it. There exists in England, and in the State of Pennsylvania, a form in the direction to the grand jury, which deserves notice; they are sworn to inquire for the body of the county. This causes considerable difficulty, particularly where something done out of the county is required as an ingredient in the charge, and if the beginning of a crime was in one county,

and its completion in another, the difficulty would be greater; but even those difficulties are remedied. The idea of his honor, JUDGE PETERS, the other day, appears to be sound. That a district is the same as it respects the United States, as a county is to a state, and, therefore, the grand jury are drawn, not from the body of the county, but from the body of the district, and the whole extent of the district is equally connected with the venue, if it be laid there. As to the evidence, therefore, I consider the crime may be laid in one county and proved in another. (2 Hawkins, Chap. 46, Sec. 182.) I consider whatever rule applies in England, or in our state governments relative to counties, is the same respecting districts under the general government of the United States; likewise, if the overt act be proved in the county where it is laid, you may go out of the county for evidence to show the intention with which it was committed. This, I think, cannot be denied. In Foster, 9, we see that an overt act not laid, may be brought as evidence to support one that is laid, in order to show the intention.

With respect to hearsay evidence, the rule of law is, that the circumstances of the oral testimony is regarded, as it may tend to establish other evidence, though of itself it be no proof. There are a variety of instances in which it is necessary to be admitted, though there is a rule against it in others. In all cases where proof is to be made by evidence of general reputation, it is useful; so, upon this occasion, it is competent to us to prove the general state of the country; if proper to show the general state of a country where insurrection prevails, it is as proper in order to show the general combination, the design and intonation, because it may be the only effectual way of coming at that knowledge. For instance; this information, which was received by the commissioner in the discharge of his official duty, is proper evidence to show why the law was not carried into effect, and, consequently, the criminal spirit of the country. Popham's Reports, 152.

*Mr. Sitgreaves* went into the case of Lord George Gordon, which had not been represented to the jury by Mr. Dallas to



his satisfaction. He related the circumstances of that riot at length. He said the acquittal of that gentleman was not a certain proof of his innocence; doubts might have arisen on the minds of the jury as to the sufficiency, or character of the evidence, or there may have been a contradiction of testimony, by which all the credit of it would be taken away. Besides, it did not appear to him that the act of high treason was committed; the multitude who accompanied Lord George to the Parliament house, did not go to compel a repeal of the law, or to overawe the Parliament, but from a report that the numerous signatures were not rightly obtained, they went to stamp truth on the instrument, and convince Parliament of the respectability of the signers. Besides, the main point of evidence of what a person heard Lord Gordon say in the lobby, was received doubtfully by the jury. Many things went to make the testimony not so unambiguous as it ought to be on a trial for life or death, and on that account, perhaps, the learned judge charged them, if a doubt hung upon their minds, to acquit the prisoner. Upon the whole, no inference can be drawn from that case.

Gentlemen, another extraordinary position was taken, by both the counsel, in defense of the prisoner. It was said, that it could be no offense to rescue prisoners who were taken up for acts committed against men who acted without authority, nor to oppose men who had not authority to assess under this law. It was attempted to be shown you that some of the assessors had not received their warrants agreeably to the act of Congress, and, thence, all the outrages were tolerated! I do not suppose that the gentlemen, engaged for the prisoner, mean to go beyond the case in which they are engaged, but I must say that their zeal on this occasion, has introduced a dangerous principle. If the apostle of any insurrection had come reeking from the gore of Europe, and had preached up to you this doctrine, he could not have done it more completely than those gentlemen; agreeably to this, the whole country may raise themselves into array against those who, *de facto*, exercise the authority of the government and the laws, yet, if called to account, the court must be informed, if

the ingenuity of the counsel can find a fault in the appointment of the persons engaged in the execution of the laws, that they have not transgressed the laws, and upon that account! Is not this at once sapping the foundation of society, and by a kind of encouragement of insurrection, striking hard at the root of all government? This is an opposition, in my opinion, upon a dangerous and destructive ground. I am not disposed, at this time, to enter into any argument whether it is necessary to prove the appointment of the officers, but, admitting it is true, that upon the indictment of persons for obstruction of process, or obstruction of a public officer in his duty, it is no offense without he prove his due appointment, yet it does not follow that facts given in evidence to prove an outrage, should require all that strictness of examination. You will observe that the prisoner does not stand charged with anything but the rescue at Bethlehem; he is now charged with the offenses he committed in Bucks, or anywhere else, much less with anything where he was not present. These previous transactions are given you to show the tendency of the design. These gentlemen exercised the offices, and it does not appear that there was the least doubt expressed in those counties of their authority, neither by the prisoner nor any person whatever, who associated with him, at any time or on any occasion; their opposition was not founded on any such pretext, but it grew merely out of the law, and, therefore, it must appear that the outrage was an unequivocal fact, conducted with the intention, so far as we can collect, to defeat the law. On these grounds there is no necessity for proof of due appointment. But what are the objections, or what proof do they require? There is no pretensions to a doubt respecting the legal appointment of any officer but the two assessors at Penn in Northampton, and Milford in Bucks; Mr. Eyerly himself tells you, that all the rest were appointed by the Board of Commissioners, and that at Penn, the assessor refused, and Mr. Balliott had the blank to fill up. Respecting the other, Mr. Foulke supplied the place of Clark, who held his appointment, and Mr. Foulke was appointed to assist him. How, then, gentlemen, from those two cases, could a general inference be

warranted that the appointments were irregular, and upon that ground, these outrages be justified?

We have heard much about the danger of following English precedents, and about the words high treason. There is a species of treason in England which cannot exist here; that is, conspiring against the life of the king, and speaking of mere words, which have frequently been construed into that crime. It has been a question of great doubt whether words can be called treason, but in that country or this, it is necessary to prove the intention with which a crime was committed; and, therefore, mere words, though it is true cannot convict, yet if a man has done a lawless act, we may exemplify the design by words, even of the prisoner himself. With respect to an action done publicly and notoriously, that is a matter capable of positive and absolute evidence, plain to the senses; those who see it can tell of it, but there can be no way of diving into the heart. If the party himself, from that recess, should develop his designs, these declarations made, either by himself or others who heard him, can prove the intention of his actions, and for that purpose is good evidence.

Gentlemen, I have now said all, which I think necessary, with respect to the law on treason. I am confident I have not done justice to it; but what I have omitted will be amply supplied by the attorney of the district, and their honors upon the bench.

I shall now proceed to investigate the facts as they have appeared in evidence, and apply the law to those facts, in order to show you what share of guilt the prisoner transacted. In doing which I shall only select the most prominent features of the testimony which may go to prove my position.

First, with respect to levying war. I think it will require but few words to show that there has been an insurrection in the three counties; that at Bethlehem there was a multitude of people in arms, amounting to the full sense of the words of "levying war with arms;" the insurgents had all the apparatus and accoutrements of a regular military force, and they went there in military array. This is proved by fifteen witnesses, not by two, merely. It is farther certain that this

multitude of people perpetrated atrocious and lawless offenses and in contempt of all legal authority, after solemn, reiterated and repeated warning; that the marshal, conformably to that humanity which characterized him, sent a deputation to them, requiring them to go home and to abandon their purpose; that he selected persons who were most likely, from their political opinions, to procure the object: but, nothing would do for them short of what they set out upon, and the mission failed.

We will next consider for what purpose this outrage was committed. It was said to be simply for the purpose of releasing the prisoners; this was the abstract and naked design. If such is the fact, the prisoner must be acquitted: but if he had an object beyond that; if it should appear that this was one link in the chain of opposition to the laws, then it mounts higher, it mounts to treason. It is my purpose to show you that their object was higher than a mere rescue, and that it did not flow from any particular regard to the prisoners in custody, but it was a public opposition, and one means used with a view to prevent the execution of a law of the United States. Gentlemen, the mere recital of one or two facts will be sufficient to bring this home to the mind of any man who is not determined to shut his eyes against plain testimony.

It is in full and complete proof before you, that, in the counties of Northampton and Bucks, the opposition was almost general, and that in the township of Milford, all along the river Lehigh, and both sides of the mountains, there was a union in opposition to the law, uniformly conducted with system, menace, and threats; that the persons who thought proper to assist in the execution of that law, were previously intimidated not to accept of it, and after they had accepted, they were prevented from executing it, and in many places until the march of the army, the law did actually remain unexecuted. I shall not state to you the particulars of this evidence, but remark that the system was general, and that it was accompanied with threats and menace, and that the friends of the law, and those who were peaceably inclined,

were prevented, under the influence of this terror, from speaking their minds on the occasion; and even the magistrates of the country were so impressed, or so intimidated as not to perform the duties of their office; that the law was completely prostrate, and persons who would have given testimony against them for these proceedings, were afraid to do it. In the course of this proceeding, it was repeatedly declared, that if any person should be arrested for opposition to the law, they should be supported. This system of menace was general; it was not an opposition grounded particularly upon the obnoxious characters of persons who were employed in the execution of the law, but upon the law itself. There was an offer of a particular commissioner to use his influence, that they might choose their own officer, but that would not satisfy their object; no, they said if they accepted that offer, it would be approving the law, and that they would not do. Mr. Eyerly, the commissioner, had been for many years the representative of this district in the Legislature. Mr. Balliott had been in the Legislature, in the Council, and in the State convention, which proves they were men of confidence in their district, and that the particular dislike now exemplified was not to them as men, but as officers under the law. One of the counsel for the prisoner went minutely into all their views, and the veins through which they acted, and endeavored to palliate or excuse the conduct of these insurgents; while, at the same time, he appears to know what were the views of government in prosecuting the delinquents; but there is no necessity to answer that, because the prisoner is not on his trial for obstruction of process. I most solemnly disavow that political party spirit enters at all into this prosecution, and beg the jury will dismiss all party spirit and prejudice from their minds. However we may differ on points of law, we must agree with them that the people had a right to examine and explain the law, and express their dislike to this or any other law. Their opposition to this law might have been right or wrong; it does not alter the case; and God forbid that any motive of the kind should influence us to revenge. These are natural rights under a free government,

which every citizen has a right to exercise. We are not now inquiring into the nature or grades of any or all those particular offenses; whether this particular outrage is a riot or that a misdemeanor, or whether it amounts to treason; we are simply showing to you, from the evidence collected, the weight and force of those facts, to-wit, that there was opposition to this law, and that universally, and that these people did their utmost to endeavor to stop the execution of the law; and that these acts were in strict union with the last act at Bethlehem, of the intention of which the previous acts collectively are plain proof; for, certain it is, that an act illegal in its nature, may receive color and complexion from one that is strictly legal. Suppose a man had reduced his thoughts on this subject to writing, without any intention of communicating it to any person; suppose, in that writing, his intentions are fully declared with which such writing was drawn; then this act, though innocent in itself, would be competent evidence to show the intention with which a subsequent outrage was perpetrated, and it would be in full proof to show that a violent opposition to the laws in that county, particularly to the act for the valuation of houses, and that it was not from a personal or private motive, but generally an aversion to the law itself, so that a long time after the period fixed for its execution, the law actually remained unfulfilled. In several parts, the people returned to a sense of their duty and submitted to the laws, and happy would it have been for the government as well as themselves if they had all done it; for, then, this investigation would have been prevented. But, in some parts, the marshal and those who were with him, who were not volunteers as has been insinuated, but acted in conformity to their duty as public officers—these were insulted, arrested and obstructed as officers. The marshal was abused by numbers of people at Millar's town, and he was not able, though he touched Shankwyler, to execute process on him. Gentlemen, all I ask of you is to connect the circumstances in your minds—the general course of events which gave rise to what afterwards was consummated at Bethlehem. The prisoners who were rescued were desirous of accompanying the marshal

to Philadelphia; they would rather not be liberated; they were taken from various parts of the country, unknown to each other, and more so to the persons who rescued them; there was no private attachment, regard, or resentment; what, therefore, could be the motive of the insurgents? Could it be interest? No! it would be bad policy to spend dollars to oppose a tax law rather than cents to support it. Was it a private, distinct interest they had, which did not concern the community? If not, agreeably to Judge Foster, it was treason. I have said that these prisoners were not known to the insurgents; I would make the exception of Shankwyler; but you will observe that he never did surrender himself to the custody of the marshal, and though some said they were come to see him as a neighbor, others to see his partner (accuser), etc., yet he was not *de facto* in custody. It could not be to rescue him that this large armed body met, because he could have been safe by keeping at home. But one solemn fact respecting the other demands a solemn inference. The Lehigh prisoners had cordially submitted to the law, and thus desired to recommend themselves to the mercy of the government by penitence, and actually at last gave the marshal their individual assurances to meet him at Philadelphia. I ask, then, by way of inference, what becomes of all the private object or the neighborhood esteem necessary to vindicate these insurgents? It was not for the prisoners' sakes, but through opposition to the law, that they did this act, for it is plain that the persons in custody of the marshal were afraid as much to trust themselves in the hands of the mob, as Mr. Eyerly or Mr. Balliott were. They doubtless had a treasonable, a rebellious determination to oppose the government; the previous declaration of the party was, that "if any persons were there in confinement who were opposed to the law, they should be rescued," was a plain indication of their opposition to the law, and that this rescue was a part of the general opposition.

Gentlemen, when these facts are taken into view, so immediately preceding and so directly pointing to what took place at Bethlehem, can you hesitate, as honest men desiring

to do justice, and speak impartially between the prisoner at the bar and his country, that he went there, not merely to rescue prisoners, but to execute a part of the general opposition to that law of the United States? If he has done so, he is guilty of treason. Let us now attend to the evidence which grows out of the avowal of the parties themselves at Bethlehem, at the time of the outrage. These are previous indications, which certainly point as truly to the intention as the needle points to the pole.

Here, then, gentlemen, the evidence closes. We find this man is not of a yielding texture; he still continued in his opposition, even at the time there was a recommendation to submit to the laws. At a meeting at Marks', it was determined to recommend submission to the officers, and all the laws of the United States, and to desist from opposition to the laws. This is proof that there had been opposition to the laws in the three counties. When these things were done, Mitchel asked Fries if he ever did intend to oppose the laws. "Yes, I did," was his answer.

In the testimony of Mr. Roberts, we have proved the general state of opposition, as well as the guilt of the prisoner; this witness was called by the prisoner's counsel. To be sure he proved the prisoner's penitence and submission. If he had not been guilty, he could not have been penitent. He said he had not slept for several nights: an acknowledgment so much the more pertinent to prove that he had been doing what he knew was wrong.

Gentlemen of the jury, I have endeavored to show you this subject in all the points of view I am able, so as to give you a right understanding of the facts; and permit me to declare to you that I have not wilfully perverted either the law or the facts, to the best of my knowledge; yet it is possible I may have done it; if so, you will be undeceived in those particulars by the court. Gentlemen, you have a solemn duty to perform. We have all had a disagreeable and tedious undertaking. I pray you to do it in such a way as may do justice to the prisoner at the bar; and at the same time consider how



much the happiness, the peace, and tranquility of your country depend upon a fair, impartial and conscientious verdict, which there is no doubt but you will deliver.

MR. LEWIS FOR THE PRISONER.

*Mr. Lewis.* It is now become my duty to address you on behalf of the prisoner at the bar, who is arraigned before you on the important issue of life or death. I do it with the more confidence, because I have not been able to learn from the counsel for the prosecution, a single instance of English law that comes up to the present case, in good times or in bad times, so as to denominate it treason, except in a determination during the bloody reign of Henry VIII., and that is mentioned among the evils of the time. I have not been able to find it under any existing circumstances whatever, and yet any person who is the least acquainted with English history or law, must know that the excise law and the shop-tax, as well as some others, have led to riot and insurrections, and a variety of trials have been held upon them. It may be right to make the experiment upon the present case; but, unless this prosecution is warranted, established in good times, and upon solid grounds, I am sorry to say, but truth compels me to declare, that it is a burning torch in the hand of a madman; it is a flaming sword in the hand of a tyrant, and has done immense injury in England. I know there is no intention in the Attorney, in this case, to do anything that is wrong; yet I wish more reflection had been used, before the prosecution had gone on. Thus it was in England respecting Hardy, Tooke, Thelwel and others; those who most understood the whole of the charges were not satisfied to call their crime a misdemeanor, though there was no direct point, in ancient or modern law, warranting any other indictment, yet the experiment was tried; but an English jury appreciated it in its proper light, and they resolved to do nothing which their ancestors had not done, not even in the application of constructive treason; and, therefore, after a mature discussion, they returned a verdict of not guilty. When, on the present

occasion, the causes and proceedings are duly considered, I am satisfied you will feel it a duty you owe to the prisoner now before you, and to your country, to pronounce a like verdict. It is not because a circumstance any way similar to this has once taken place, and been argued upon the same grounds, that therefore it is right it should take place upon the present occasion; adopting a principle of this kind has often made courts, in arbitrary times, take gigantic strides over the statute of Edward III., so that a man could not know how to look, act, speak, or even think, without difficulty and danger. I have said that I am not able, except during the mandatory reign of Henry VIII., to find the trace of a single instance where rescue, under any circumstances whatever, has been found to amount to treason, and if succeeding ages did not consider themselves bound by that practice, I trust you will not sit here to establish a law, but to give it such a construction as justice demands of you. I have undertaken this cause the more readily, because I do not undertake to justify, to palliate, nor to excuse; but I censure the transactions which have given rise to this trial as much as the counsel for the prosecution does. I am as sensible as they are, that those people violated the law without cause; and I came not here to set up a mock excuse for them. No, it is my opinion that they merit exemplary punishment, but that punishment must be conformable to law, or, when once the law is overturned, the consequences will be incalculable; offenses higher than the present may be committed with impunity by some, while those of less grade will be severely punished in others. It is not for me to say that the prisoner is entirely innocent. To me, to the court, and to you, it is totally immaterial whether he has acted wisely or foolishly, guilty or innocently, if not guilty of the offense upon which he now stands upon his deliverance. I may be asked here, how I came to defend a man who, I had admitted, had violated the law, and in some degree set the government at defiance? My reasons are these: It is the privilege of every man to have a fair trial, and not to be condemned without being heard, especially in affairs of a highly criminal nature; few men are capable of

defending themselves before a court, and in a capital case, from the perturbations of their minds, still less so than in any other. And woe betide that country, where a man so charged should not be entitled to every assistance that he can procure! By the statute of William III., which is the first that ever allowed counsel at all, the court were directed to assign counsel, who were obliged to render all the assistance in their power; the same is allowed by our act of Congress (p. 112, sec. 29;) for without that, he may be considered as condemned unheard, and the public mind would be left unsatisfied as to the innocence or guilt of the accused. Those who have entertained the surprise I have hinted at, at my being thus engaged have doubtless acted from the best of motives; but, not satisfied with this, and wishing to spill the blood of a man before he is proved guilty, some calumniating scoundrel has, in a public print, had the hardihood, during the present trial, to impute to the unhappy prisoner's counsel, the base influence of gold, when all concerned know very well that the prisoner has not a farthing to give, and not a farthing, nor even a promise of any, was ever given to those who have undertaken his defense. I will say no more respecting this vile attempt, but that the law says no publication shall take place which may tend to influence a court or jury, while a trial is pending, and therefore it is a high contempt thrown upon the court, and upon you, and the probability is that either the author or the publisher will be brought to answer for his conduct.

There is one thing, gentlemen, I would wish to caution you against. There are many citizens who suppose that the troops will never turn out again unless a conviction takes place on the present occasion, and that an insurrection will soon appear again. But this is paying a poor compliment to our volunteer troops, to suppose they would not be satisfied without shedding blood. Gentlemen, let no arguments or considerations have weight with you but what are supported by law, and then decide, regardless of the consequences. Another matter I would caution you against, is one with which I found very considerable difficulty to cope; but at length I

divested myself of it, and I pray you to do the same. I mean all kinds of prejudice as to the party tried and trying. Our Constitution and our laws are wisely calculated to preserve the happiness and interest of ourselves and posterity. Our government is composed of tried patriotic characters, and our political bark, with such men at the helm, need not fear a storm; but notwithstanding this, it is vilified and abused. These are grounds for prejudice to work upon, and it is difficult, I can say by experience, to avoid its influence; but when we come to the sacred temple of justice, even if to decide between A and B, on a matter of trifling property, we are sworn to an impartial and unprejudiced decision; and how much more is it demanded of us in a case of life and death? It is necessary to enter that temple divested of opinion or bias, otherwise there is not a fair scope for our reasonable faculties to act, nor can our consciences be acquitted of guilt. I will take the liberty of reminding you that your oath is "that you will well and truly try, according to evidence;" this obliges you to expel everything from your minds which you might have heard out of doors respecting the whole business of the insurrection, excepting such only as proved by the evidence. Your present situation, gentlemen, imposes upon you a duty which is highly important; important as it concerns your country, the prisoner, and likewise yourselves. It concerns him, because his life or death is, in some measure, placed in your hands; it is upon your verdict it depends whether he shall continue with industry to spend the remainder of his life with his family and friends, or whether he must leave them all, and be suspended between heaven and earth to a gazing multitude. Your decision is of importance to your country, because we are now treading upon the dangerous and, I had almost said, unbeaten ground of constructive treason, and because it may and will operate as a precedent to future proceedings. Nor is it less important to yourselves, because, if, owing to honest intention and mistaken views, you should go farther than a reflecting moment would dictate, in some circumstance of a public nature which

might possibly occur, the work would be irretrievably done, the reflection would come too late, and pardon would be out of the question.

I will now proceed to consider the particular offense imputed in the indictment to John Fries, the prisoner at the bar, by which he must be convicted, if at all. To this indictment he has pleaded not guilty, and you are sworn to decide upon the issue. The question is not whether he has, or has not, been guilty of a riot or rescue. He may have been guilty of a high misdemeanor, of this or the other description; but the question is, has he ordered, prepared, and levied war against the United States? That is the language of our Constitution, and the act of Congress formed thereupon. In order to insure the conviction of this man at all events, it has been stated to you, and that with no small degree of confidence, that, as the framers of our Constitution have adopted the words of the English statute, the courts are bound to admit the expositions which have taken place upon it from time to time in the English courts. Though we have laws of our own, yet in order to know the true meaning of our Constitution, we are to go back into the remotest and most dark ages of English history, to understand its meaning! The English statute, or the opinions of the courts of justice, are equally become part of the code in that country, it is true, and it was as possible for the framers of our Constitution to have extended the one as the other to this country, had they chosen so to do, but their not doing it, is a presumptive proof that it was not acceptable. To me it appears strange, that while the English statute is not in force here, the English construction of that statute should! That is a position I never mean to subscribe, but controvert it from the beginning to the end of this case. As we have enacted laws of our own, and have not extended the laws of England to this country, we must put our own construction upon them, and not the determination of an English court. Neither the English laws nor the opinions of English judges are to be regarded any farther than is consistent with our good, to appreciate which, the

situation of the times when those opinions were given, and whether the judges were dependent or independent, are important considerations. I do not mean to find fault with English decisions in general. I believe that with regard to property, since the judges have been rendered independent of the crown, it is as wisely administered as the laws of any part of the globe are: but they were not always in a situation to give impartial opinions, when they held their station at the will of an arbitrary monarch, who could hasten or delay causes at his pleasure, to which the judges were the most obsequious tools. Such has been the decisions of some periods respecting treason. But it is not true that the very words of the English statute are adopted in our Constitution. They very materially differ. The statute of Edward III. does not provide that confession must be made in open court if received at all. It does not specify that two witnesses shall be necessary to establish the fact, but it was left to the court upon principles of common law; nor does it say a single word about an overt act. Since, then, the two statutes are so dissimilar in important points, it would be very wrong to admit of the same construction in both. So careful was our government of the lives of our citizens, viewing the injuries other countries had sustained by indefinite laws, they provided that the crime should be put in the indictment, and supported by the testimony of two witnesses. In England there might be one witness to one overt act, and another to another.

But I shall now proceed to show what does, or what does not amount to levying war. In doing this, we are not to go back to corrupt times, under corrupt judges, nor do I think the observations of those judges are in the least obligatory upon our courts; but how far they will be respected, is another question; we may rest assured they will be regarded no farther than reason will suggest. This I consider of importance, not only at present, but to posterity. Most of our laws, it must be remembered, are from England, and were brought with our ancestors as their birth-right. This was the case wherever British subjects emigrated; but as soon as we be-

came independent States, we enacted laws of our own, although in a great degree copied from British States, but they became new under our Constitution.

I think, gentlemen, I shall be able to show you, upon the opinions of men sound in law knowledge in England, that the definition of treason in our Constitution will not bear the construction that has been put upon theirs at an early period. We have an express and distinct meaning of this crime in our own acts of Congress; in the act passed 1790 (vol. i. page 100). Section 1 shows what treason is, and particularizes wherein it shall consist. Section 5 defines the punishment which should be inflicted on a rescue of persons committed to custody, or in the hands of the officer. But there was another act passed defining the precise circumstances attending this case—this was passed after the declaration of the judges on the case of the Western Insurrection—and from its being enacted subsequent to all others upon this species of crime, appears to me to be binding upon our courts. I mean the Sedition act. It appears to reach the present case in the fullest extent; the language of that act is, whoever shall combine or conspire, etc., shall be guilty of a high misdemeanor; this act does not specify the number. A township, a county, or twelve counties equally are within the law. Combining to prevent the execution of the law. This reaches the action, whatever may be the number or force used. It is a misdemeanor, and shall be punished with fine and imprisonment, not death. Whether the object shall or shall not be effected, the law says the punishment shall be the same. Here, then, is a solemn declaration made by the legislature itself, the same body that enacted the punishment of death to what they termed treason by a prior law, and surely that authority had the greatest right to put a construction on, or make an alteration in their own law. If there is a legal definition of the crime committed by the prisoner at the bar, this act contains it. Every case is here provided for by the punishment of fine and imprisonment, and had a prosecution taken place under this act, a conviction would have been certain, and the punishment would have been rigorous and exemplary.

Under this head of English construction, I would ask how it can apply to us, when we consider that before the act of William III., no person charged with high treason was allowed counsel to plead for him, unless he stated some objection in point of law which made an argument necessary, and even then he could not do it without first admitting the truth of the fact charged against him, and yet all the decisions of English courts alluded to were formed before that period! Further. Not only was the accused not allowed counsel, but he had hundreds of the most respectable witnesses to prove the falsity of the allegations, he never had a right to bring them forward until the reign of William III. These decisions, gentlemen, of the English courts, which are called up as precedents for us to regard, were formed under these arbitrary circumstances. No counsel allowed, even though the prisoner was deaf and dumb, nor witnesses, if he could even prove he was hundreds of miles distant at the time. Further, to show what dependence can be placed on the sayings of these men, you will observe that, until the time of William III., all the judges held their commissions during royal pleasure only, and even until the first of George III., the judges were never completely independent, and of course were obliged to study the royal pleasure; their opinions being extorted before the trial commenced. The consequence of all this is plain, that no impartial opinion could be given. It was common before trial first to closet these dependent judges and bring them to submission if their opinions ran counter. Bacon, the greatest, wisest, but meanest of mankind, thus stooped to become the tool of his master. Those who could not thus be brought over were deposed, and more obsequious persons placed in their room, and it was not till they could have a decision thus formed that persons were brought on their trial for high treason. And yet we are referred to these persons to tell us what is the meaning of our own statute on treason! Thus it was that many of the best citizens of England fell a sacrifice, and for no other purpose, many of them, than because they possessed exalted virtue. During the existence of this state of things, the judges would sit silent on their bench during a



trial for life, and hear the crown officers, instead of acts and expressions of humanity to the unhappy prisoner, abuse him with the most opprobrious and insulting language. Influenced by this meanness, Sir Edward Coke, while attorney general, descended to abuse the great and good Sir Walter Raleigh with the vile epithets of traitor, viper and spider of hell, etc., turning away from him with the greatest scorn. And this was the manner in which trials were commonly managed. See Foster, 234.

It was well known that the statute of Edward III. made no provision whatever respecting the charging of an overt act in the indictment, nor does it say anything about proof: but a statute enacted in the reign of Edward VI. made two witnesses necessary in cases of high treason; but Foster says no great regard was paid to this better statute till near a century after, and the reason assigned was that it was not for the safety of the crown, or to the common well known rules of legal evidence. It was common to admit one witness of his own knowledge, and another by hearsay, if it was even from the mouth of that one, and at the third or fourth hand, and frequently the depositions were taken out of court to be read, rather than bring them into open court. This must appear an uncommon representation of the administration of justice, but it is a fair picture of the times under which the decisions took place which are brought against us. At the period in which the seven bishops were tried, Lord Camden declares that Justice Powel was the only honest man that sat on the bench. Blessed justice! I know that since the judges have become independent men in England there has been as much independence in their conduct as in any country; but then, as Hale tells us, these decisions had already taken place, and therefore they must be abode by; but he takes care to caution future judges how they introduced new cases by putting new constructions. The question now is, whether this court and jury are prepared to be bound by judges thus principled and thus circumstanced, to form a decision upon our own law. I contend that these decisions are by no means binding upon us. We have the Sedition law, which compre-

tends the whole case. In 1 Hale, 132, and 1 Blackstone, 69, it appears to be lamented that the independent judges of later days have no power to alter the rules of law established in the dark ages of English jurisprudence; otherwise, we have reason to believe, they would not be in existence at this day. Lord Kenyon, when counsel for Lord George Gordon, declared, that he did not think the Parliament of Edward III. ever had any design that constructive treason should exist at all, or any wish to leave room for it to be introduced. We are certainly, therefore, untrammelled by every foreign rule; otherwise the question would be, what rules we should adopt, and what not. It is a rule in law that statutes affecting life, should never extend beyond the letter of the law, so as to leave the possibility of a doubt. If that is a rule respecting penal statutes in general, abundant more so is it necessary respecting the high crime of treason. Above all things, if bad times should ever happen in this country—and bad times may come here as well as they have in all other countries—it will be of vast importance that the law should be known precisely; it will be of consequence to a citizen to know on what law he is to be tried, if he becomes the devoted object of any one's resentment, or commits a crime. It is of consequence that the flood-gates of usurpation and tyranny should never be left open, and the liberties of our citizens be thrown away *ad libitum* on the uncertain ground of construction. 1 Blackstone, 88, Foster, 58, we read that it ought to be "clearer than life itself."

We now come to examine the true, full, just and reasonable meaning of our own treason statute; for I do not admit that constructive treason ought to exist at all. A line is drawn, and if we ever cross it, where are we to stop? Treason against the United States, we find, consists in "levying war against them," etc. The question is, what is levying war? Levying war may fairly extend to the three following things:

First. Where a body of men take up arms, and array themselves in a martial manner against the government, with a view to put an end to its existence. This is its plain natural meaning, but cannot be said to have been transacted by the

prisoner at the bar, and therefore requires no farther definition.

Secondly. It is expressly levying war, if a part of the Union throw off all allegiance and authority of the United States, totally disregarding its laws and institutions, and act as a divided people as though they did not belong to them.

Thirdly. Where laws have been enacted by the Union, pursuant to the Constitution of the United States, and a number of people, being dissatisfied, should, of their own authority, by numbers or force of arms, take possession of the legislative or executive authority, and by this force of arms or numbers should undertake to compel either of the departments of government to act as they dictate, thus robbing the government of its legitimate power, by assuming it themselves.

No doubt the good of posterity was intended in the constitutional definition of treason, and we are to touch it with a trembling hand indeed, lest it moulder, and grow into God knows what. Now, as this is an act which was deliberately formed, if we go upon the dangerous ground of construction, that cannot be done so deliberately. No; I say it was to be handed down pure to posterity, and we ought not even to depart from a letter of it. If liberty of construction is to take place in any degree, by so much it tends to render the Constitution vague and uncertain, and we know not where it will end. If the Constitution only intended the three definitions of levying war which I have laid down, it is clear that a man cannot overstep those constitutional limits without intending to do it. Go beyond this, and you leave jurors and judges to make the Constitution anything or nothing—a mere nose of wax, to be moulded into any form at their will; and they may be excused, because left to exercise their own judgment upon it; but Lord Hale has charged you not to do this, even though encouraged by a parity of reasoning: agreeably to his apprehension, it is deducible that if ever we have a bad president, presidential encroachment may wrest the Constitution to everything that may serve any particular purpose. But God forbid either should ever happen.

I shall now proceed more particularly to state my reasons

for alleging that the crimes with which the prisoner is charged are fully comprehended, and punishment provided for them, in the Sedition law. This I shall consider first, as it relates to the rescue independently; secondly, I shall make some observations on the law, independent of the rescue; and thirdly, both together.

It is admitted, that the mere rescue of the persons from the custody of the marshal at Bethlehem, would not amount to treason; and it would not be necessary for me to say a word about that, were it not for the following reasons. Speaking of pulling down meeting-houses, brothels, prisons, etc., the crime is defined, 4 Blackstone, 129: "Offenses against public justice, is obstructing the execution of lawful process." This, there can be no doubt, is an offense at common law, and persons found guilty of a rescue of a person convicted of a crime, are adjudged guilty of the same crime, and would be punishable accordingly, had it not been for our act of Congress (the Sedition act); but that act reduces a rescue, generally, to misdemeanor. But agreeably to law, persons rescuing others not committed for treason, are not guilty of treason. A case in 4 Blackstone, 86, the party himself was guilty of felony at common law by making escape, but I believe it to be an entire new doctrine to make the offense of the accessories or assistants higher than those who are rescued. Rescue of persons for felony has been always felony, for treason, etc. I think, therefore, it is clear to prove that every exertion has been used to attempt to make treason of this crime, by the gentlemen, but it is as clear that they have searched and tried in vain.

But it is farther said, that this business assumed a generality, and that the object was to defeat a law of the United States, for which purpose a number combined and conspired together, and more effectually to accomplish this, they rescued the prisoners, and therefore committed treason. Were I to admit this, I might call upon the gentleman to support his conclusions by authority, to show that preventing the execution of process, or releasing prisoners before they were carried to jail, is treason. I repeat, that the only case men-

tioned, is in the disgraceful days of Henry VIII., which I think is inadmissible. But I deny the fact. I deny that there was any combination or conspiracy between the people of Lower Milford, in Northampton county, and those of Bucks county, at all upon the business. First, the people of both counties were alike averse to this law, and for similar reasons. I believe there are many unprincipled men who wish to injure their country, and go about preaching up sedition to the people, which, communicated in different directions, catch fire in the same manner, and perhaps at nearly one period; hence it is that their prejudices and opposition may appear from the same cause, without parties holding the least correspondence. I ask you whether there is a title of evidence to prove that ever the prisoner went into Northampton county till this circumstance occurred? was there any communication by writing, or any other way? no, not at all. Upon what foundation can a conjecture arise, then, that there was a combination? You are not to try by conjecture, or wild supposition. No, you are sworn to "well and truly try according to evidence." Does it appear, I ask you to recollect, gentlemen of the jury, that this conduct was instigated by any intercourse in any way held with Northampton county? No, it does not; but there is a strong presumption that the discontents took root and grew to that state without any combination at all. But whether or not treason was committed in Milford township, is not for you at present to say; the overt act is laid at Bethlehem, and there it must be proved, that he levied war upon the United States with a number, or by force sufficient for the purpose, and that with them he combined and conspired, etc. If he did this at all, he did it on the 7th of March, for it does not appear that he ever was there before in his life; now if there was a conspiracy, it must appear that he acted previously and in concert with others, and the act would have been alike chargeable to all; but this does not appear. It is true Fries was heard to say, "we will oppose you, and all the people of Northampton will join us;" but this could easily arise from his having heard that the people of Northampton were dissatisfied with the law, but it does not

follow that, because there were discontents in Northampton county, he should be responsible for their actions, particularly since it all, at least, depends upon conjecture. Kelyng, 19, has a case to answer this, where rebellion existed in two parts at one time, but it was determined that this might happen without correspondence, since no such evidence appeared, and therefore no notice was taken of it. Then, gentlemen, if I were for a moment to admit that John Fries had committed treason in Bucks county, which I deny, it would be immaterial upon the present occasion, because upon every indictment for treason, the overt act must be proved in the county. But it is said that doctrine does not apply, each State being to the whole United States as a county to the State, because the Grand Jury have the district at large to inquire for; and therefore it is immaterial whether laid in one county or the other. If this be sound law, dreadful indeed must be the situation of the people of the United States, if the government should ever fall into different hands from those in which it is now happily placed, because an attorney may, at any time, keep a person, arraigned for a capital offense, in ignorance, till he comes to the place of trial, and of course not prepared to repel it at a very distant place from where the act is laid. But this, I will be bold to say, cannot be law. My reasons for thinking so are, first, the law of Congress, called the judiciary act, sec. 29, vol. i. page 67, says, that in cases punishable with death, the trial shall be had in the county where the offense was committed. Here I would remark that the law takes notice, not of a State or a district, but of a county, and therefore the analogy drawn by Mr. Sitgreaves, that a district to the United States is the same as a county to a State, is not in point. The trial is to be had in the county unless the judges shall determine that it cannot be had there without great inconvenience (see Foster, 194); but let the offense be where it may, twelve jurors must be summoned from the county; see p. 237 of the same book. If we examine these authorities, they will appear different from what they were represented. 2 Hawkins, c. 46, sec. 34, is an authority to prove that upon a plea of not guilty to a specific charge

as to place, etc., in an indictment, if the least variance appears from that place, it is sufficient to acquit the party, and is fatal to the prosecution. It is not necessary for me again to say that you are totally to exclude from your views whatever the prisoner did in Bucks county, since the charge is laid in Northampton, and since an acquittal from that charge will not prevent a prosecution in Bucks county. If it appears that no treason was committed by him on the 7th of March at Bethlehem, you must pronounce him not guilty.

The circumstances which led to the expedition to Bethlehem had nothing to do with it, save the *quo animo*. It appeared that they heard Shankwyler was to be there; but it is not pretended that going there upon that account would be treason, and particularly as Shankwyler was not in custody; and it does not appear that the prisoner knew of any others being there at that time. Then the object particularly was to see Shankwyler. When they came to the bridge, it appeared to them that two men were detained at Bethlehem, and it seems they went forward to rescue them. In this they were justifiable; for if the law was violated, it was by Major Nichols, in making an arrest which the law did not authorize him to do. They were illegally detained, and it was lawful for anybody to go and rescue them. (2 Lord Raymond, 1301.) I am not disposed to blame the marshal; but I cannot justify him in point of law. His situation, no doubt, rendered it a prudent measure; but it was detaining men by false imprisonment, and was enough to alarm all the people of the State. I mention the circumstance only to prove that there can be no rescue, unless the persons liberated are legally confined. Instead of Fries being guilty for that action, a very worthy man (the marshal) was guilty of assault and battery in the act of detention. If this is fact, how does the affair stand afterwards respecting universality and design? I have justified Fries and the others in leaving the bridge to go up to Bethlehem, and the laws of their country will justify them, because it does not appear that they knew these people were discharged. When they got to Bethlehem, it appeared there were a number of persons under arrest; for, it does not at all

appear in evidence that they ever heard before that Fox, Ireman, or the Lehigh prisoners were there. The gentlemen on the other side only presume it; but you, gentlemen, must not go upon presumption. "You must well and truly try, and true deliverance make, according to evidence." It does not appear they knew of it; they came from a great distance, and from quite another part of the country than where the Bucks county people came from; Fox and Ireman had been just brought in, and none of them knew they were there; however, when they were got there, upon a lawful occasion, hearing of a number of persons being confined there, and that they were to be taken to Philadelphia for what they considered to be no crime, they generally waxed warm; but Fries was cool; he endeavored to pacify them. He had brought his sword with him, but when he was appointed an ambassador of peace to treat with the marshal, he left it behind him.

The whole of the transaction must be viewed as a sudden affray, like numerous cases mentioned in Hale, Foster, etc., where great and sudden riots arose. Where is the proof, I ask, of combination, of association, or of correspondence? None at all. They came there to a man without the least treasonable views, for it was merely by chance they came there at all. There was much rage among the people upon the first impression the knowledge of the prisoners in custody made, and had it not been for the cool conduct of the prisoners at the bar, blood and massacre would have been the immediate consequences, for, no doubt, liquor was operating pretty much in their brains. An altercation took place. They insisted on the prisoners; and in the prosecution of his delegation, from the peremptory demands of the people, he made use of language which I admit was unjustifiable, and violating the law, for which he ought to be punished, but not with death. 1 Hale, 153. But further: The persons were not in prison, they were only in custody of the marshal. These are materially distinct; the releasing of persons taken to prison, is only a misdemeanor, while releasing them after they are in prison, which is in some measure the sanctuary of the law, is



felony. 4 Blackstone, 130. The breaking open of prisons generally is treason, but in no case is the releasing prisoners before they are taken there (Kelyng, 75, 63; Lord Gordon's trial); (Demarree's case, 4 State Trials, 844 and 900). It would not have been treason, therefore, if a number of persons had actually conspired to rescue these prisoners from the marshal, nor even if they had been confined in a jail, instead of a room, because it was not a general design to break open all prisons, but one only. But, on the contrary, they were not in prison; they were only in custody of the officer who served the process; how, then, in the name of reason and common sense, will it be made to amount to treason when it would not if they had been in jail. But, say the gentlemen, we will not call it rescuing of prisoners, but a general obstruction of the execution of the law, and the means here used were to support that general object. The rescue is of itself a specific offense, and of itself admitted by Mr. Sitgreaves to be only a misdemeanor. If it is so, how is it possible to convert a misdemeanor into a treason, and thus to take away the life of a man when imprisonment only is his desert! But what ground is there alleged for this position? It is said that the arming and arraying a number of men was with this intent. I deny the fact, and it has by no means been proved. The cases referred to in England are treason to a demonstration. Enhancing servant wages could not be done by force but by surrounding the Parliament house, and this was justly denominated waging war against the king. Any rising to alter religion must be effected the same way. Religion is established by law in England, and that law must be altered by the Parliament; therefore it could not be forcibly altered but by levying war. (4 Blackstone, 81.) Reforming the laws must be done the same way, if at all. (1 Hawk. c. 17, sec. 25; see Erskine in Gordon's trial, 32.) Not only open rebellion, but resisting the laws as enacted is treason. The laws are a proof of the authority of the commonwealth, and resisting those laws is making the parties independent of the commonwealth, and therefore a defiance of the authority of

the State. Lord Mansfield, in the charge on the same trial, says, among other enumerations, that combinations, etc., to arrest the execution of militia laws, is treason. This strongly merits observation. Why does the learned and experienced Lord Mansfield particularly specify militia laws and no other? Why does he not say to arrest the execution of any law? Why the militia law? For the best of all reasons—the same reason as the taking or attacking a fort or a castle belonging to the king, because that is the place where he keeps his military forces, and because the military is the strength of the kingdom, and this is resisting the military authority. Therefore, it must be allowed, that a resistance of militia laws is upon a very different footing than any others, and, in time of danger, resisting this law would prevent the militia being drawn into the field when there is occasion for them.

Now, gentlemen, these things all considered, plainly show, that what is now attempted is a novel experiment, like modern philosophy, an entire new thing, saving the solitary instance in the reign of Henry VIII, and it is clear that the resistance of no law is treason, but the militia law. I agree also with the doctrine Lord Mansfield lays down, that any attempt to oppose the laws, by intimidation and violence, is levying war, and treason.

It is unnecessary for me to turn to the books to prove that confession of the party, or words spoken by him, taken perhaps in time of fear, are not to be regarded by you. This was so plainly improper, that the law of William III, making two witnesses necessary, or confession in open court, was enacted; I need only turn to our own laws (judiciary act). There must be one of two kinds of proof: the party in open court must confess, for confession out of court cannot avail, even if made before ten thousand witnesses; or else two witnesses must prove the same overt act, and he must be convicted upon that indictment, if any. If you are to go to all parts of the country for heated words, heard by anybody, in any circumstances, I must consider it as a very scandalous abuse of the statute of Edward III. I think it impossible to

hesitate at what was the meaning of Congress when they made this act, and therefore, shall barely recur to the evidence.

Here is a proof that the prisoner came up to Bethlehem, where he acted in a certain manner; but the gentlemen concerned for the prosecution, think that does not sufficiently indicate his design, and therefore they travel to Jacob Fries', to Kline's, and a number of other places: now suppose you convict him, I entreat you to inquire from what evidence you do convict him? Is it from the overt act committed at Bethlehem, or from that and other circumstances together? If this is the broad ground upon which you go, do you convict him upon the evidence of two witnesses, to the same overt act, transacted at the same place? No, you do it upon the evidence of two, and a number of other evidence besides, on a variety of circumstances. Let me suppose for a moment, that two witnesses had come forward, and given an account of his conduct at Bethlehem; but that evidence was not sufficient to answer the indictment: you hear of such and such conduct at Quaker Town, at Kline's, etc. I ask, would he have been convicted upon the evidence of those two, independent of any other? No, he would not. This is by no means agreeable to the statutes of William III, or Edward VI, and in my view totally inadmissible. What is the consequence of such a verdict? Why, a man charged with murder, assault or what not, may know who the witnesses against him are, while one charged with treason, the highest possible crime, may not know, if you can travel from town to town, and from county to county for the evidence, if you can bring correspondence, etc., from every part, of which the prisoner knew nothing until brought before the court. No man would be safe in the admission of such things, but you must form your opinion alone from the evidence of two witnesses relating to the act committed at Bethlehem agreeably to the indictment. The statutes, and our act of Congress mean and intend to prevent this kind of rambling over the whole state for evidence; or, indeed, upon the doctrine of the gentlemen, notwithstanding the act says otherwise, they can with equal

propriety go throughout the United States to collect evidence to support the prosecution, which was never seen nor heard of before.

I now contend, gentlemen, that the case of the prisoner at the bar does not come within the statute of treason: and I also contend that it does come within one of two other acts, for the judiciary act, 22d and 23d sections, page 109, Vol. I, speaking of resistance of process and rescue, completely extends to the prisoner. No, say the gentlemen, it is not a mere rescue, but a rescue for certain intentions and designs. Have the Congress distinguished any particular design, or have they not, in this law? No, they have not: then permit me to say, where Congress have not distinguished it, nor the books, it is not for judges nor juries to distinguish: it belongs to Congress to make or except such cases as they thought proper; they have not thought proper; and you have no right whatever to do it.

But lest any objection should appear of weight to except it from the judiciary act, there is a very good law, but which has been shamefully vilified and abused, called the sedition bill, providing fine and imprisonment for any high misdemeanor, under which, as I observed before, the very actions of the prisoner are defined. This act has passed the trials of the Western insurgents in 1794, so that the opinions of the judges respecting treason at that time, are most clearly and fairly superseded by this act, which has pointed out whatever has heretofore caused doubts about the meaning of treason in the statute, and thus put an end to any judicial construction. That act provides, that if any person should combine or conspire together, to impede the operation of any law of the United States, or to intimidate any persons holding places or offices under the United States (this last is one of the many little things collected together, in order that, when brought into a mass, they may amount to treason), and that, if they should advise, attempt, or procure any insurrection, riot, or unlawful assembly or combination, he or they shall be deemed guilty of a high misdemeanor, whether it be carried into effect or not. The very crimes which are here enumer-

ated are charged upon John Fries, the prisoner at the bar. Now, if any act or description can be more just than this, I should wonder; it answers precisely every part of the crime charged, and every concomitant circumstance. Now the question is, whether or not, as the Constitution did not define the punishment of treason, and as a misdemeanor is described here to be what some have thought used to be levying war, and as the punishment is less than what the other law respecting treason enacts—whether this should not operate as a repeal of the former law, so far as related to these points. As to the cases of Vigol and Mitchell, Western insurgents, I should doubt whether it would affect them at all, even if the law had then existed, because the circumstances very much differed from the insurrection in Northampton County. Wells and Neville were inspectors, and their offices were strictly belonging to the United States, and were deposits of the United States, and equally under the protection of the law with castles or citadels: in addition to this, the officers of government were driven from their own homes, and upon pain of death, they dared not approach their homes. Their offices were burnt by the insurgents, and there was no law that touched their case but the constitutional act defining treason; on which account, they were tried and convicted under it. I would introduce these ideas, to show you, that the decisions then formed by the court, are inapplicable at this time, since the Sedition Act is since passed, and agreeable to these circumstances, which materially differ from those of 1794.

It is now time to close. Gentlemen, the task which you have to perform is very serious, and very important; but I will not insult your understandings, by saying more than my indispensable duty claims from me, in behalf of the prisoner. You will, I have no doubt, consider the case calmly, wisely, and deliberately. You know the law, under the direction of the court: and I have no doubt you will decide according to the impulse of your consciences. I will only add, that the prisoner received, and has held his life from the authority of Him who is all-wise, great and good, and by Him only can

it be destroyed, except he has violated those equitable laws made by his country for the preservation of peace and order in society: he is, therefore, entitled to an equitable verdict: if he has done the acts named in the indictment, I have no doubt you will pronounce him guilty: if he has forfeited his life, go he must, and if he is to go, it is not in the power of men to prevent it. I shall, therefore, rest assured, that you will give a conscientious verdict, upon which you are bound to answer.

MR. RAWLE FOR THE PROSECUTION.

*Mr. Rawle.* Gentlemen, I thoroughly appreciate the importance of my situation as public accuser—hope that while duty peremptorily imposes upon one the necessity of doing justice to the United States, I may not be divested of candor towards the unfortunate prisoner at the bar, to whom I hope full justice will be done.

I propose, in the first place, to collect the detail of transactions, in the clear and unequivocal train they had been testified by the several witnesses, not only called to support the prosecution, but unhappily for the prisoner, corroborated by the witnesses called by himself. In the second place I shall apply these facts to the laws and Constitution of the United States: from both of which it would evidently appear to the jury that the prisoner was guilty of treason in levying war against the United States.

The prisoner stood indicted for opposing, in a warlike manner, two laws of the United States, the one entitled “an act providing for the valuation of lands and dwelling-houses,” etc., passed July 9, 1798, and the other entitled “an act for levying a direct tax within the United States,” passed July 14, 1798. Agreeably to these acts, certain commissions and assessors were to be appointed to carry the provisions thereof into execution. It appeared in evidence that Mr. Eyerly, one of the witnesses produced, had received a commission conformable thereto in a part of Pennsylvania, which he received in August, 1798, together with a request from the Secretary of the Treasury, that he would find suitable characters

to serve as assessors to act in the division assigned to him. In the execution of this request, Mr. Eyerly found very great difficulties, although there was a perfect acquiescence in all other parts of the Union. Many whom he nominated declined on account of the unpopularity of those laws, although Mr. Eyerly very industriously, and in a praiseworthy manner, endeavored to remove those objections.

The general difficulties there were in the execution of these officers' duty is shown in the testimony of Mr. Eyerly, and its confirmation by Mr. Chapman, Mr. Henry and others, of the difficulties the assessors found in the execution of their duty and the insult they frequently met with, when engaged in their pacific efforts to explain the laws to the misled rabble. But these commendable efforts were outweighed by the influence of certain leaders, among whom are found several captains of militia, and Fries with the rest: he throughout the whole scene appeared the most prominent, and instead of attending to the good advice given him by his best friends, flew in a rage and renewed his opposition. A part of the effects of their hostility was accomplished in preventing Mr. Clark from fulfilling the office which he had undertaken, and the general reluctance there was in others, and indeed finally the abandonment of the assessments; for it appeared that, not only those who were unwilling to give their rates, refused, but those who were willing were intimidated from doing it. To such a pitch was intimidation and disaffection arrived, that the very magistrates of the peace had so far neglected their duty as to join the opposition, and nearly all of them, from one or other of these motives, refused to issue process for the apprehension of delinquents, or examine persons who opposed the laws: and those who did attend to their duty, found the greatest difficulties to procure the attendance of evidences, who were prevented by the impulse of fear from coming forward. Many attempts were made to pacify these deluded people, who were under the most baneful advice, and the attempts accordingly miscarried, even though propositions were made in some townships to indulge them with the choice of their own assessors.

These are facts; not founded on the testimony of a single witness, which is sufficient to convict a man in common cases; nor are they confined to the testimony of two witnesses, which is all the Constitution requires; but they are corroborated by numerous witnesses, produced in order to remove every doubt from your minds as to the material facts of the crime. There is no case in our books more clear than the present; the evidence is so uniform that even the ingenuity and talents of the prisoner's counsel have not been able to contest one fact that has been related; indeed the whole is so fair, that the most incredulous must be satisfied of the accuracy of the charge, independent of the confession of the prisoner, which confirms the whole; it proves to a demonstration that his main object was nothing less than to prevent the execution of the laws which all men are bound to obey.

Gentlemen, the counsel for the prisoner have endeavored to diminish the force of that voluntary confession by telling you that no man can be convicted upon his own confession out of court, nor without the testimony of two witnesses; the same arguments have been used to nullify the expressions which we have produced proof that the prisoner frequently made use of, from which we evidently discover his intention. I allow that no man should be convicted for treason unless upon the testimony of two witnesses, or confession in open court; but when all the facts necessary to substantiate the crime are proved by two witnesses, the declarations of the prisoner, as well as his confession, may be produced as good evidence as to his intention, and this is not necessary to be proved by two witnesses; this tends to show the designs of his heart, which can only be known to his Creator and himself. These declarations should be known to the court in order to discover the intention with which the crime was perpetrated. In the case of Lord Gordon, the words said to have been used by him in the lobby of the House were not rejected by the jury because it required two witnesses, but on account of the improbability of a declaration having been publicly used which no more than one individual could be produced to prove. We have proved by two witnesses that the overt act



was committed by the prisoner, and have produced much corroborative testimony, in which we have not been confined to two, having heard it from twelve respectable witnesses. If we have succeeded to prove the intention, it is sufficient for the law, and if you believe the testimony, it indubitably substantiates the fact.

I shall now proceed to consider what is the law arising upon these facts, in going into the examination of which, I shall put out of the question two objections; one of them only has been produced, the other having barely been alluded to, rather than held up.

A proclamation was issued by the President, on which Fries did then go to his home, whereupon it has been argued that no instance can be produced to prove a prosecution being commenced for acts committed prior to the reading of the riot act in England, if the mob thereupon dispersed, because they had complied with the proclamation. It is right in part: if the people do not disperse, the remaining mob are guilty of felony; but I ask the gentleman has the defense been at all set up on the ground of compliance with the proclamation? In the riot at Drury Lane theater by the footmen, and that which was held up in which the Earl of Essex and others were engaged, many of the rioters did disperse in consequence of the riot act being read, and yet were afterward punished for the enormities they committed while they were there. Alike trivial is the objection respecting the undue appointment of assessors. It is sufficient that such a person acts as commissioner or assessor; if he usurps that power, the law has provided a remedy by other means than the dangerous one of an insurrection to know merely whether A, B or C is regularly appointed to office. There are legal modes of application to ascertain the fact; there is the whole board of commissioners, or even a higher power may be applied to, to ascertain the authority, and no virtuous, honest citizen would think of opposition on that account. We do not think it necessary to trouble the court, since it was fully in power of the prisoner's counsel to have brought commissioners under this act before them; but not having availed themselves of it,

nor pressed it home to your notice, gentlemen, why was such a scare-crow insinuated, but to mislead you? There can be no doubt of the legality of those commissioners; if there was, it would not alleviate the crime of rebellion. But that was never used, neither by the prisoner himself, nor any of the insurgents, as a ground for the rebellion; it was not even a color for it, nor does it appear that the insurgents ever doubted in the smallest degree, the legality of the appointments; their declarations were repeatedly, "No assessors shall act in this township, nor shall any assessments be made." No doubt was ever made of the powers used by the officers, and therefore the opposition to the law is alone to be considered.

Having disposed of those two points, I wish now to impress upon your minds a most solemn conviction, to-wit: That the law under which the prisoner at the bar stands indicted, without being in the least doubtful, ambiguous, obscure, or perplexing, is well defined in, and composes a part of, the Constitution of the United States, Art. 3, Sec. 3. It is certainly momentous that you should be fully satisfied of the true meaning of that part under which the present crime is placed, to-wit: levying war against the United States. I would premise that the indictment is worded precisely in the usual form, and that the only question now is, what is that levying war with which the prisoner is charged?

To ascertain what is levying war, it is necessary for us only to consider what is the nature of civil and political society in the United States. The government is the organ which the people collectively have thought it their duty and interest to establish for their mutual safety—their will, publicly expressed in the laws, is the legitimate will of the majority of the people; all our laws are the acts of this majority; and it is a radical principle which will not be controverted, that the will of the majority is always binding upon the minority, and should be acquiesced in quietly by them, whether the administration of that government be in the hands of one person, or of many; those, therefore, who do not choose to continue in that society, ought to withdraw

quietly from it, rather than disturb the quiet of the whole. Allegiance is a quiet submission and acquiescence to the supreme power. In monarchical governments it is placed in the king; but the citizens of America know of no allegiance but to the laws, for they alone are the binding principle by which society at large is kept in domestic peace and security. If, therefore, deviating from this allegiance to the laws, measures are taken to disturb the public peace by a resistance of the laws, accompanied by force of arms, or by the intimidation of numbers sufficient for the purpose, and it be applicable only to a grievance of a public or general, and not of a particular or private interest, such resistance then becomes the crime of treason, and particularly so if the views are to bring about the suspension or repeal of any of the laws; for there is no particular kind of law liable to exception; it is treason, because it is an attempt to overturn the fundamental principles of society, by endeavoring to impose into the system the will of a minority which has no right to be there; it is creating a new agency, a new species of legislature, and eventually dissolving the powers legally ordained. This definition may apply as well to any one law as to all the laws, for each is equally stamped with public approbation, and to none particularly is sanctity attached, all proceeding from one power, those who undertake to resist any one, may with equal propriety resist the whole, and treason appears to me to be the inevitable inference; otherwise it would be impossible to ascertain the limits at which this dangerous licentious conduct must stop, we should be at once thrown back into a state of natural society, which God prevent. I ask the gentlemen who argued for this distinction, to point out to me which law may be resisted with impunity! If one may be, the evil principle will go on to another and another, and where will it stop?

I have no occasion again to recur to the authorities we have produced, which the gentlemen pass over as the acts of bad times, corrupt judges, a profligate court, etc. The counsel, with all their learning and industry, seem to be satisfied with this general discharge of our authorities; but what-

ever might have been the baseness of the attorney-generals of those times, the meanness of the judges, the profligacy of the court, or the merits of the prisoner, we stand upon broad, established and general ground, which is not pretended to be obligatory upon us merely because it has heretofore been decided, nor is it obligatory in England upon that account, although you have been so told, but we go upon it, because it is right. That Sir Walter Raleigh was grossly abused by Sir Edward Coke, is notorious; it was the bad practices of those times; but this reference more regards the proceedings on trials, than the decisions; the decisions uniformly were, that usurpation of public authority in a certain manner amounted to treason. What! shall a man be permitted to attack the government by piecemeal? to take out a plank here and a plank there, till our political ship sinks, and such conduct not be called a treasonable division of the government! With respect to the authorities wherein it was stated to be necessary that the design should be to pull down meeting-houses, brothels, etc., generally, in order to constitute high treason, it must be observable that it was the assumption of the legal powers which constituted the crime; to pull down meeting-houses as such, was interfering with the toleration granted by government, and therefore treasonable. With respect to bawdy houses, government and not individuals, have a right to correct them, and if individuals pretended to correct the evil, they were attainted of high treason.

We are told that no case is to be found in which a mere rescue is called treason. Hale, 133, in my opinion, is an authority in point. Bethlehem was the prison of the United States under the marshal; there the marshal held several persons in custody; and levying war, or attempting by force or intimidation to deliver those prisoners out of his custody, is certainly treason. Here we stand upon settled ground, we say, and I appeal, gentlemen, to your recollection, that there was no particular view to relieve any particular person, but that the words were "Shankwyler and others;" the claim was general, and the object was general—the repeal of the law was that object, and these were the means used to obtain it. This

is declared to be treason even by that great and virtuous man who is held up to your notice as guarding us to beware of introducing more constructive treasons: Sir Matthew Hale, whose very name carried authority at the period of 1668, and with him all the judges, upon mature deliberation, have declared this to be sound law. As burglary, arson and murder may be made the means of treason, so may rescue; treason must have some means; sometimes the most atrocious, sometimes the means may be newly invented; but because newly invented, it cannot lessen the crime. With respect to the murder of Sir Theodosius Boughton by Captain Donnelan, in England, which was merely by a draught of laurel water (which in that country is poison),—a new invention for murder, the counsel might have argued against the conviction, because no former case had occurred, as well as that the innocence of this rescue should be held up, because new. But there was no such thing. A strong and important part of the combination was actually carried into effect, and it was not absolutely necessary to prove the rescue in order to prove the treason; it has been evidently shown to you in the transactions at Quaker town, that the rescue was only a part, and the termination of the general plan so far as it proceeded.

I have no need to take up more authorities to prove that this is treason; it was so before the birth of our Constitution; this principle was coeval with the reign of Edward III. in 1340. I take it to be a true and incontrovertible principle, that when we find an act on which previous decisions have been made, those decisions have been acted upon, and we should think proper to pass that act by ingrafting it into, and making it a part of our Constitution, those decisions are of course adopted as our direction, whereby we are to understand the applications of that act. I would barely observe, that while those gentlemen are telling us that we are not to have recourse to those volumes of laws (which we ought all to be acquainted with, as volumes of science, explanatory of the code by which we are bound), they themselves resort to the same species of authority, to endeavor to prove that treason under the act of Edward III. is treason in America.

We have heard much about constructive and interpretative treason, and constructive levying of war. Agreeably to the form of government in England, the king is recognized as king in two capacities, one in his natural, as king, and one in his political, as sovereign. Now, when that part of treason called compassing the king's death is mentioned, it refers to his natural capacity; but when of levying war against the king, it refers to his political capacity, and it was therefore necessary to show the distinction between different species of treason; this latter is termed constructive treason; but from the variety of its modes of introduction, cannot be so well defined; but its existence is necessary, in order to support society and preserve it secure. This is what is termed levying of war; it may consist in opposition to the king's forces, or by threats or force attempting to compel the king to remove his ministers or alter established laws. If you expunge what is direct levying of war, there can no such thing as treason be found; either the law is wrong, or the arguments used on the other side. Gentlemen, the law is established, but the arguments vanish like vapor before the morning sun; what, then, in England is called constructive levying of war, in this country must be called direct levying of war. The framers of our Constitution were as learned and as wise as any gentlemen now at the bar; they certainly saw that this was the only kind of direct levying of war that could exist in this country, and therefore if they had not intended that what was called constructive in England should constitute what they called "levying of war against the United States," they would not have introduced the crime at all. This is an absurdity they never would have been guilty of.

The learned gentleman admits that resistance against one particular law may be termed constructive treason, and may be the crime of treason here. He says that resistance to the militia law would be a restraint upon the principal dependence of the government, and therefore treason; gentlemen try our arguments by this test, and see whether resistance on the present occasion is not equally so. I ask you what is to become of the militia, the standing army, the eventual army, or

the civil power itself, if you are unable to raise revenue? Who will fight, who will transact your civil concerns, if they are not paid? If by opposing revenue laws the government itself as well as the army is fundamentally undermined, is it not at least as much treason as though the militia alone were more openly (but more effectually) attacked? Nothing is so much entitled to respect and submission as laws which are the direct means of keeping society together. At the present time, when the feudal system is no more, but from necessity subsistence must be obtained from employment and labor, the defense and preservation of the country must come from the revenue, and to destroy that is to give a mortal wound to the government itself.

*Mr. Rawle* then went into a review of some of the circumstances, alluded to by the opposite counsel, which characterize the insurrection, and the trials thereupon in 1795, which he insisted, though those gentlemen would not allow it, were very similar in circumstances to the unhappy affair now before the court, in which he drew the following parity between the cases:

In 1794, the disturbance was to prevent the execution of one law—the excise law. In 1799, the house and land-tax laws. In 1794, four counties were engaged in opposition. In 1799, but three: Northampton, Bucks and Montgomery. In 1794, the excise officers were attacked and prevented executing their duty. In 1799, the assessors were the same. In 1794, the insurgents collected into an army, in battle array, displaying their ensigns of triumph, with numbers sufficient to procure their object; say, 6000 men in Braddock's field. The object of 1799 was to do it in a similar manner, and they actually did, by their military appearance and boasts of much larger increase, impress a general opinion of their power sufficient to accomplish their purpose. In 1794, the insurgents made public declarations that the excise law should never be executed. In 1799, were not declarations of the same nature made by these insurgents?—that other counties, and even other States, would support them, and that it should never

be done? The object of 1794 was to obtain a repeal of a law—the excise law. In 1799, it was the same, so far as related to them—the house and direct tax. In 1794, the excise officers were compelled to promise that they would not execute the law in that part of the country.

In 1799, the same promise is exacted, and obtained respecting Lower Milford and other parts. There was some difference, it is true, as the gentleman stated, some of the officers at that time being banished from their houses, on pain of death. It was farther argued, that there was this striking distinction—that General Neville's house might be considered as a castle of the United States, because it was an office of excise; but the analogy still holds good; it was General Neville's dwelling house, however, that was attacked; the attack was made only because he was an officer employed in the superintendence of a tax they disliked. Mr. Levering's tavern at Bethlehem was made the prison of the United States, and there was an executive officer of the United States; it was as much so as any other prison in the Union. This was the castle, the fortress of the United States, to protect which the marshal had assembled his *posse comitatus*, provided with weapons of defense. I consider this, therefore, a more violent breach of the law than the attack upon General Neville's house, so far as it went—admitting that no guns were fired, nor lives lost, nor was any house burnt, otherwise, so far as it went, the case was rather stronger than the former. Happy is it for the prisoners that the scene of riot was not farther from the seat of government! if it had been more remote from the power of government, we cannot calculate upon the consequences, or increase of revolt and excess which would have been evinced. I will not pretend to anticipate them, for I wish not to inflame my own mind by the sad calculation, nor the minds of the jury; I only wish the facts to appear in their native colors.

Why, then, can we entertain a doubt, viewing all these circumstances, that the prisoner is guilty of treason? There can be none. We are told that the legislature have passed



a law, entitled the Sedition act, which shows the offense of the prisoner; and that the opinion of the legislature was to bring under this law the constitutional definition of treason, making it a misdemeanor! To me, of all the weak arguments which have been brought in behalf of the prisoner, this is the weakest. This law, which has been cried up from one end of the continent to the other by some persons as unconstitutional, is now to be brought into court to explain away what the Constitution positively defines to be treason. If this ever had been the intention of the legislature, there certainly would have been something like treason, something like levying of war introduced into that bill, but we find no such thing; the words do not at all occur in it, and that it is not intended, I think is clear. Sedition and treason are two distinct crimes, and two distinct punishments are enacted to meet them. The description of crime in the Sedition act, is—those who combine with intent to impede the operation of the law, and those who intend to raise an insurrection. These are to be considered as guilty of a high misdemeanor. Now, those who conspire to commit treason are not considered guilty of treason; the treason must have been carried into effect. It cannot be treason for a man to counsel, advise, or attempt to procure insurrection, with intent to impede the operation of any law of the United States; but this is declared to be a misdemeanor, whether executed or not. Besides, the word “treasonable” is not inserted in the sedition law. Thus, if a man be indicted for taking the property of another, unless the word feloniously is introduced, he is not liable to the charge. So in this case, the act must be traitorously done, or it is not treason. To show the absurdity of this doctrine, we need only for a minute suppose, that in the commission of any of the crimes specified in the Sedition act, lives should be lost, houses burnt, etc. The laws of the United States have previously declared, that such offenders should be punished with death, and surely it ought to be carried into execution—not be mitigated by a future law to the mere penalty of five thousand dollars, and five years’ imprisonment.

If this was the intention of the legislature, might it not, at least, be expected that they would have declared so in the act; but they have manifested no such intention in that, nor in the present instance, with respect to which, had they done it, they would have overleaped their constitutional powers; for the Constitution is an ark, into which the legislature itself dare not place its feet; if they were to do it, the judiciary have the power, and it is their duty to bring them back again, and say: "You have gone too far." They can as much restrain an unconstitutional act, as Congress can make a constitutional act. This Constitution gave Congress the power to declare the punishment that should be inflicted on what it had defined to be treason. Congress had nothing to do with the crime, and if they have declared it, as the gentleman supposes, they have done it without authority, and it can be of no avail whatever. But no—they have rather, in the act alluded to, declared what should not be considered treason, or removed doubts upon that head. This being the case, the same opinion which operated on the judges in 1795, is still in force; because no legislative act has intervened to change it. Certain it is, that Congress did not intend to enact an unconstitutional punishment for treason; but if they had intended it, they have not a right to do it, nor have they done it.

Now, gentlemen, whether these things are as we have represented, or not, is for you to judge, and decide upon your information; if you are satisfied that the prisoner at the bar was engaged in the affair at Bethlehem, and that affair was connected with your previous arrangements, you must convict him, otherwise, you must not. We consider, and think the evidence must prove to you, that all are parts of the same whole, were begun long before the 7th of March; and that they partly existed in Northampton and partly in Bucks counties. It must be upon a full conviction in your minds that the treason was committed by him in Northampton county, that you can convict the prisoner; and if you have not that full conviction, I firmly hope you will acquit him; if you have, you are bound to pronounce him guilty.

*May 9.*

## JUDGE PETERS' CHARGE.

JUDGE PETERS. Gentlemen of the jury: As this case is important, both in its principles and consequences, I think it my duty to give my opinion, formed with as much deliberation as the intervals of this lengthy trial would permit, on the most prominent points of law which have been made in this cause. I have condensed my sentiments into as short a compass as possible. I shall leave remarks on the evidence, and more enlarged observations on the law, to the presiding judge, who will deliver to you the charge of the court. At his request, I state my individual opinion, though I do not always deem it necessary, when there is a unanimity of sentiment in the court.

1. It is treason "in levying war against the United States" for persons who have none but a common interest with their fellow-citizens, to oppose or prevent, by force, numbers or intimidation, a public and general law of the United States, with intent to prevent its operation, or compel its repeal. Force is necessary to complete the crime; but the quantum of force is immaterial. This point was determined by this court on a former occasion, which was, though not in all circumstances, yet in principle and object, very analogous to the subject of our present inquiries. I hold myself bound by that decision, which, on due consideration, I think legal and sound. I do not conceive it to be overshadowed, or rendered null, by any legislative construction contained in any subsequent act of Congress. The law, though established by legislative acts, or settled by judicial decisions, may be altered by Congress, by express words, in laws consistent with the Constitution. But a mere legislative construction, drawn from any act by intendment, ought not to repeal positive laws, or annul judicial decisions. The judiciary have the duty assigned to them of interpreting, declaring and explaining—the legislature that of making, or altering, or repealing laws. But the decision of a question on the constitutionality of a law is vested in the judiciary department. I consider

the decisions in the cases of Vigol and Mitchell, in full force, and founded on true principles of law. The authorities from British precedents and adjudications are used as guides in our decisions. I will not enter into a discussion whether we are bound to follow them; because they are precedents,—or because we think them reasonable and just.

If numbers and force can render one law ineffectual, which is tantamount to its repeal, the whole system of laws may be destroyed in detail. All laws will at last yield to the violence of the seditious and discontented. Although but one law be immediately assailed, yet the treasonable design is completed, and the generality of intent designated, by a part assuming the government of the whole. And thus, by trampling on the legal powers of the constitutional authorities, the rights of all are invaded by the force and violence of a few. In this case, too, there is a direct outrage on the judiciary act, with intent to defeat, by force and intimidation, the execution of a revenue law, enacted under clear and express constitutional authority. A deadly blow is aimed at the government, when its fiscal arrangements are forcibly destroyed, distracted and impeded; for on its revenues its very existence depends.

2. Though punishments are designated, by particular laws, for certain inferior crimes, which, if prosecuted as substantive offenses, and the sole object of the prosecution, are exclusively liable to the penalties directed by those laws, yet, when committed with treasonable ingredients, these crimes become only circumstances or overt acts. The intent is the gist of the inquiry in a charge of treason; and is the great and leading object in trials for this crime.

The description of crimes, contained in the act commonly called the Sedition act, lose their character, and become but component parts of the greater crime, or evidences of treason, when the treasonable intent and overt act are proved. So it is with rescue of prisoners; which, in the present case, was not an independent offense, but an overt act of the treason. These were crimes—misdemeanors—at common law; and might have been punished by fine and imprisonment when substantive independent offenses. But, when committed with

treasonable intent, they are merged in the treason, of which sedition, conspiracy and combination are always the harbingers. I do not think that the acts relating either to sedition or rescue have altered the principle, though they have defined and bounded the punishments. The law, as to treason, is the same now as if those offenses were still punishable at common law. The Sedition Act cannot constitutionally alter the description or the crime of treason, to which the combination and conspiracy to perpetrate this offense, with force and numbers, are essential attributes. Numbers must combine and conspire to levy war. But if these indispensable qualities of the crime are, by the legislature, declared only misdemeanors, and separated from the treasonable act, the legislature nullify the description of treason contained in the Constitution; and so indirectly alter and destroy, or make inefficient, this part of that instrument. The Congress neither possess, nor did they intend to exercise, any such power. They could not (nor did they so intend) place the crime declared in the Constitution to be treason, among the inferior class of offenses, by describing some of its essential qualities in the Sedition Act, and prescribing punishments, when they solely constitute substantive and independent offenses. Congress can only (as they have done) prescribe the punishment for treason, regulate the trial, and direct the mode in which that punishment is to be executed.

3. However indisputably requisite it may be to prove, by two witnesses, the overt act for which the prisoner at the bar stands indicted, yet evidence may be given of other circumstances, or even of other overt acts, connected with that on which the indictment is grounded, and occurring or committed in any other part of the district than the place mentioned. Although the prisoner be not on his trial, nor is he now punishable, for any other than the overt act laid, other overt acts and other circumstances, parts of the general design, may nevertheless be proved, to show the *quo animo*—the intent—with which the act laid was committed. Indeed, the treason would be complete, by the conspiracy, in any part

of the district, to commit the treasonable act at Bethlehem, if any had, in consequence of the conspiracy, marched or committed any overt act for the purpose, though the actual rescue had not taken place. So we thought in the cases of the Western insurgents, that the treason, concocted at Couche's Fort, would have been complete, if any had only marched to commit the crime; though the design had not arrived to the disgraceful catastrophe it finally attained. Indisputable authorities might be produced to support this position.

4. The confession of the prisoner may be given in evidence as corroboratory proof of the intent, or *quo animo*. But, although proved by two witnesses, being made out of court, it is not of itself sufficient to convict. Two witnesses are necessary to prove the overt act. But the intent may be proved by one witness, collected from circumstances, or even by a single fact.

5. The doctrine of constructive treason has produced much real mischief in another country; and it has been, for an age, the subject of discussions, among lawyers, other public speakers, and political writers. The greater part of the objections to it are totally irrelevant here. The subject of them is unknown, and may it ever remain so, in this country. I mean the compassing the death of the king. It will be found that the British judges, since the days of political darkness and bigotry have passed away, are to be found among the most able and decided opposers of the abuses of this doctrine. They do not follow decisions and precedents rooted in bad times, because they find them in their law books. On the contrary, on a fair investigation, it will be proved, that those contrary to justice, reason, and law are rejected. It is not fair and sound reasoning to argue against the necessary and indispensable use of construction, from the abuses it has produced. What is there among the best of human (and I wish I could not add divine) systems which has not been perverted and abused? That there must be some defined sense and interpretative exposition made of the

terms "levying war," and when, and in what circumstances, it is levied "against the United States," cannot be denied. The able counsel, in this case, who has said the most on this subject, and traveled the farthest into the gloomy, dark and tyrannical periods of the British history and jurisprudence, for melancholy and disgusting proofs of atrocious abuses, and even crimes, committed under color of law, has unavoidably, himself furnished also proofs of the necessity we are under of some constructive or interpretative expositions. He, at first, confined these expositions to three cases. Now, if there is a necessity of one, it shows that, without supplementary interpretation, the law would be a mere dead letter. Aware of the dangerous lengths to which the abuses of construction have been carried, courts and juries should be cautious in their decisions; but not so much alarmed about abuses as to restrain from the proper and necessary use of interpretation. I do not then hesitate to say, that the position we have found established, to-wit, that opposition, by force and numbers, or intimidation with intent to defeat, delay, or prevent the execution of a general law of the United States, or to procure, or with a hope of procuring, by force and numbers, or intimidation, its repeal or new execution, is treason by levying war against the United States. And it does not appear to me to be what is commonly called constructive, but open and direct treason, in levying war against the United States, within the plain and evident meaning and intent of the Constitution.

6. As to the objections, founded on want of proof of regular appointments under, and of the proper execution of the law called the house-tax law, I do not see that they apply. If the prosecution was definitely for opposing one or more officer or officers of this tax law, the proof might be more rigidly required. But, as all the necessary use made of these collateral and subordinate circumstances, relative to the tax law officers, is for the purpose of showing the *quo animo* or intent with which the treason alleged was committed, I consider them as not relevant in this cause. It is even enough

in criminal prosecutions, more directly aimed at the specific offense of opposing an officer, that he was an officer *de facto*.

7. As to the disarming and confining the two videttes, or advance of the armed insurgents, by the marshal at Bethlehem, I think him legally as well as prudentially justified in his conduct. Even a constable has a right to restrain and confine, under strong circumstances of suspicion, persons whose conduct or appearance evidence an intention to commit illegal and violent acts. Much more so was the marshal (having notice of an intended rescue of his prisoners), justifiable in seizing and disarming two of the armed body, against whom existing circumstances raised strong and evident suspicion. But I think this has been made more important than it really is. Because the release of these men was not the object of, or even known to, the prisoner at the bar and his party, when they commenced their treasonable march for the release of the prisoners in the marshal's custody at Bethlehem.

8. The President's proclamation should have been pleaded as a pardon, if it was intended to be relied on as such. This not having been done, it is not legally before us. But, since it has been mentioned, I think it necessary to declare it as my opinion, that it does not operate as a pardon to precedent offenses. It is directed by law as a step, preparatory to applying an armed force against those supposed to have committed crimes and embodied for unlawful purposes. It is a humane warning, calculated to prevent the effusion of blood. Its allegations of facts, or its injunctions, have no operation in the trial of the prisoner at the bar.

Whether the prisoner is or is not guilty of the treason laid in the indictment, in the manner and form therein set forth, it is your province to determine. It is the duty of the court to declare the law; though both facts and law, which, I fear, are too plain to admit a reasonable doubt, are subjects for your consideration. We must all obey our public duty, whatever may be our private feelings. Mercy is not deposited in our hands. It is entirely within the constitutional authority of another department.



## JUDGE IREDELL'S CHARGE.

JUDGE IREDELL. Gentlemen of the jury: I am persuaded that every person who has attended to the present very awful and important case upon which you are now called to decide, must be impressed with a just respect for the patience and attention you have shown, through the long period which unfortunately has been taken up; but this, though much personal inconvenience must have been experienced, not only by you, but by all concerned, is unavoidable; none of us can repent that, in a case of such moment as the present, the time which is absolutely necessary for a complete investigation has been employed.

Gentlemen, it is with great satisfaction to me, on the present occasion, that my ideas on the points of law directing our conclusions, upon which it is the duty of the court to give opinion, absolutely coincide with that of the respectable judge with whom I have the honor to sit. Before I state to you any observation with regard to the facts which have appeared from the evidence, I shall previously deliver my opinion upon some points of law, so far as they are unconnected with the evidence; those which are, I shall speak to in their proper place.

This, gentlemen of the jury, is an indictment against the prisoner at the bar for levying war against the United States; the first inquiry, therefore, is, what is meant by these words of our Constitution—"Treason against the United States shall consist only in levying war against them," etc. These words are repeated verbatim, I believe, in an act of Congress, called the judiciary act, defining the punishment of the crime of treason, pursuant to constitutional authority. This crime being defined in the constitution of our country, becomes the supreme law, and can only be altered by the means therein pointed out, and not by any act of the legislature; and, therefore, the repetition of the words of the Constitution in the judiciary act is quite unnecessary, as the only power left to Congress over this crime was, to describe the punishment. The same act, in another part, makes provision for the method

of trial. Agreeably to their power, Congress have described the punishment, and thereby declared the crime to be capital. It is clear, therefore, that, as the Constitution has defined the crime, the Congress, drawing its sole authority from that Constitution, cannot change it in any manner, particularly as it is so declared; yet the counsel for the prisoner say, that the legislature have given it a legislative interpretation, and that their interpretation is binding on this court. They say that Congress did not mean to include the offense charged upon the prisoner at the bar, under the definition of levying war; because the Sedition Act describes a similar offense, and because a rescue is provided for in another act, the punishment extending no farther than fine and imprisonment. Several answers may be given to remove these objections:

First. If Congress had intended to interpret these words of the Constitution by any subsequent act, they had no kind of authority so to do. The whole judicial power of the government is vested in the judges of the United States, in the manner the Constitution describes; to them alone it belongs to explain the law and Constitution; and Congress have no more right nor authority over the judicial expositions of those acts, than this Court has to make a law to bind them. If this was not an article of the Constitution, but a mere act of Congress, they could not interpret the meaning of that act while it was in force, but they may alter, amend, or introduce explanatory sections to it. In this we differ from the practice of England, from whence we received our jurisprudential system in general; for they having no Constitution to bind them, the Parliament have an unlimited power to pass any act of whatever nature they please; and they, consequently, cannot infringe upon the Constitution. The very treason statute of Edward III. itself contains a provision giving Parliament an authority to enact laws thereupon, in these words: "Because other like cases of treason may happen in time to come, which cannot be thought or declared at present, it is thought that, if any such does happen, the judges should not try them without first going to the king and Parliament, where it ought to be judged treason, or otherwise felony."

On this point, Sir Matthew Hale was very careful, lest constructive treason should be introduced.

This, gentlemen, you will observe, only relates to any case not specified in that act. But, on the occasion now before you, it is not attempted, by any construction or interpretation, that anything should be denominated treason, that is not precisely and plainly within the Constitution. No treason can be committed except war has actually been levied against the United States.

But farther, nothing is more clear to me than that Congress did not intend, in any manner whatever, to innovate on the constitutional definition of treason, because they have repeated the words, I think, verbatim in their own act; with regard to the rescue and obstruction of process, which are mentioned in the act alluded to, it will not be pretended, by any man, that every rescue, or every obstruction of an officer in serving process, or even both together, amounts to high treason, or else to no crime at all. No; the crimes are differently specified, and rescue or obstruction of process may be committed without that high charge. This, I think, was sufficiently explained by the counsel for the United States. Suppose one thousand men rise in arms, avowedly to destroy the government, and in the execution of their design commit murder, burn houses, purloin property, etc., does it make the design less evident, because they committed other atrocious crimes in order to obtain their main views? No; it was to destroy the government, and that crime would be charged upon them, being the higher crime, which the concomitant ones only tended to aggravate, as they were committed, not for the purpose of committing murder, but to intimidate the government, and accelerate their object. With regard to what is stated in the Sedition Act, combinations and conspiracies to raise an insurrection—these, gentlemen, may be committed without the parties being guilty of treason; men may combine and conspire for a private purpose; possibly to injure an individual, merely to gratify some private motive; if so, they come within that act, and that only. It is only when they carry their projects farther; when they aim at the

destruction of the government, that the nature of the offense attains the aspect of, and essentially becomes, treason; and, therefore, it is necessary to prove the intention; otherwise there can be no treason. There can be no levying war without a number of persons unite, and that number cannot levy war without some previous intention; and, therefore, under this law, there being no previous intention defined, but merely an unlawful combination, the act termed treason in the Constitution, it is plain, is not intended, nor is it of the nature of treason.

With regard to the authority from which the opinion of this court is founded, and of which you have heard much already, I shall trouble you with a very few observations. When this Constitution was made, it was in the power of those who formed it either to define treason or not, or, if they thought proper to do so, to do it in what manner they chose, in which they might have followed the example of the country whence their ancestors came, to which they were accustomed, and in which they were most experienced in their own several States, where the crime of levying war was denominated treason. I believe this has been generally followed through the States. In some I know it has. This term of levying war is an English expression, borrowed from the statute of Edward III.; but, notwithstanding this, the principle provisions respecting treason are taken from an act of the British Parliament in the reign of William III., which is principally calculated to guard the independence of the court against the power of the crown, and the prisoner against his prosecutors. Now, I must confess, as these able and learned framers of our Constitution borrowed the act, in terms, from the British statutes alone, an authority with which they were familiar, that they certainly at least meant that the English authorities and definition of those terms should be much respected. Those gentlemen knew as well as any counsel at the bar, the danger of constructive treasons. They knew how to guard themselves against the bad times of English history, and were equally acquainted with the better and more modern decisions. Would it not have been natural for men so able, so

wise, so cautious, of their liberties, had they entertained a doubt of their insufficiency, to have introduced some new guards, some new interpretations, and not to have left us in later times in the dark, exposed to so much danger as the gentlemen of the bar apprehend? Gentlemen who know anything of that country, know that arbitrary times have existed, and also that a number of decisions have taken place since that period. I do not believe that any judge since the revolution in England has ever considered that he was bound to follow every arbitrary example of the English courts, or the crown laws which had taken place in dark ages? Can any man suppose that, if a man was to be prosecuted for either of the crimes referred to by one gentleman (Mr. Lewis), so absurd a prosecution would be for a moment indulged by the judges of this age? No, they would highly resent such an insult offered to an enlightened court. Such instances have ever been reprobated as much by the courts, as by the gentleman who quoted them.

With respect to this doctrine of precedent, I will take the liberty of submitting to you a case of a civil nature; suppose it a case of great moment; suppose in this court, or any other from which an appeal could not be had, a solemn decision had been had respecting a title to a piece of land; upon this adjudication a gentleman wishes to purchase this land; taking his title to a lawyer, he is confirmed in the opinion that the title is good, and that he is safe because of the decision of the court. On the faith of this decision alone the man lays his money out, and therefore it must be important how precedents are formed. If precedent is so important in a civil case, how much more so must it be in one like the present. If a case is new altogether, and no precedent can be found, it ought to be much in favor of the prisoner, but if a solemn declaration has once been made that such and such facts constitute a certain crime, that declaration ought to be abode by, and for this plain reason; every man ought to have an opportunity to know the laws of his country (if he will take pains to inform himself) lest he should involve himself in guilt ignorantly. The propriety and necessity of this must

be manifest, and if so, it is as necessary that the proceedings of our courts should be uniform, otherwise there can be no dependence upon their judgment. If, therefore, a point has been settled in a certain way, it is enough to direct any court to settle a future case of a similar kind in the same way, because nothing can be more unfortunate than when courts of justice deviate in decisions on the same evidence.

This leads me, gentlemen, to point out to you a consideration of great magnitude. This is not the first time, as I have been informed, that these questions have been discussed in the court. During the trials of the persons concerned in the Western insurrection, they were discussed, and I have no doubt with great ability on both sides. Judges Paterson and Peters were then on the bench, and after all the display of splendid talent used in argument on both sides, and all the authorities produced that men were capable of, from the best judgment that could be formed, the court, without hesitation, declared itself in favor of the prosecution. As I do not differ from that decision, my opinion is, that the same declaration ought to be made on the points of law at this time. Vide 2 Dallas' Reports, 355.

It is, however, objected, that after this solemn decision had taken place, the legislature, by the Sedition Act, settled the matter differently, and that we are bound by that act. This has been answered, so as to remove it beyond all doubt, and concessions were made at the bar sufficient to remove the seriousness of this objection out of the way. It was acknowledged that, if it had been an opposition to the militia act, then the crime would have been treason; or if it had been done to compel the repeal of an act, it would have been treason. For my part, I cannot perceive what kind of sanctity there is in the militia act more than any other, that should make my opposition to that act particularly serious. All the acts of Congress flow from the same authority, and all tend to the same end, to-wit, the happiness and security of the community. Individuals may differ in their views of the magnitude of them; some may think the militia law, some the revenue law, some another, but the legislature have

thought all these laws equally necessary, and they having thought so, it is our duty to obey them all alike. But, if the opposition to the militia law, by force of arms, is to have this extraordinary sanctity, because it strikes immediately at the existence of the government, then I should be glad to know what can be said about a revenue law? Government cannot exist a day without revenue to support it! Farther: opposition by force to one law, is of the same nature as opposition to all the laws; the offense is levying war against the government; opposing, by force of arms, an act of Congress, with a view of defeating its efficacy, and thus defying the authority of the government, is equally the same in principle, if done in one instance, as it could be in many. In monarchical governments it will sometimes happen that a rebellion breaks out in an endeavor to destroy one monarch, and set another on the throne. In such a case the treason plainly and equivocally displays itself, and there can be no doubt about it; but this cannot occur in a republican form of government. Men are seldom found who will be guilty of such open treason, as to come forward, in the face of day, and declare their design to destroy the Constitution or all the laws. No, if men of sense go to promote insurrection, whether they mean to destroy the government or not, they must be wicked; they go about their design by more insidious means; art will be used, and pains taken to promote a dislike to a certain law; this evil prejudice is encouraged until it becomes general among the people, and they become as ripe for insurrection as in the present case. Nor would the evil cease with the destruction of one law. They may declare they mean to stop at that one act, but having destroyed it, and finding their power above that of the government, is it not to be apprehended that they would destroy another and another, and so on to any number they disapprove of. If they would not be particular in one case, they would not in another. During the Western insurrection, the excise law was unpopular. In this case it is the house tax act; and if this is permitted, it will be impossible to know where we can rest secure, nor how soon the government itself will fall a prey. This reason may account for

the introduction into the English statute book, and our Constitution, with the determination of the courts in both countries, of the principle that an attempt by force and violence to impede the operation of a single act, shall be treason, and under the description of levying war, as much as what shall at first appear more dangerous, since the effect may be the same.

There is another preliminary point, meriting a few observations, that is, with respect to the proclamation of the President. It was contended that, because that proclamation required the people to disperse, and commit no more crimes, it amounted to a pardon of all they did before. It is sufficient to observe here, that, had this objection been seriously made, a plea of pardon upon the ground of that proclamation must have been preferred, or it could not have been admitted. But the plea was not made, nor if it had, would it have been effectual, because, if this did amount to a pardon, it did so only on certain conditions; the attorney of the United States and the party are both allowed to show whether or not the prisoner has complied with the conditions of the pardon. It is possible, also, that the pardon has not been offered in such a manner as the Constitution permits, in which case the attorney must be permitted to put in a demurrer. Of the force of these objections the court are to decide, and of course the plea must be referred to them.

Again, this pardon might have been pleaded in due season. Of this the counsel for the prisoner were informed, and had time to consider, but they did not choose to avail themselves of it. But if it had been proposed, nothing is more clear to me than its insufficiency; for in my view, the proclamation contained no pardon at all. The circumstances which gave rise to, and the nature of the proclamation, ran thus: Certain information was received by the government of a disturbance having broken out in that part of the country, which baffled the power of civil authority, but as it is necessary to prevent any insurrection with as little trouble as possible, after inferior means have failed, the law provides that the President shall make proclamation, inviting and command-



ing such disturbers of the public peace to disperse in quietness to their homes by a certain time; this must be done before the military can be ordered out against them. This is in order to prevent more people joining the standard of rebellion afterwards, and to admonish others not to commit farther crimes; but there is not a word in the proclamation implying an offer of pardon for anything committed before.

The riot act of England was cited in support of this doctrine, but there is no similarity in the two cases. That act says, a magistrate shall go to the mob, and endeavor to prevail upon them to disperse. If he cannot do it, he reads the act, and if they still continue combined, they are guilty of felony, but then this felony is a crime created merely by that act, but even that act does not intimate that they should be pardoned for crimes committed before the magistrates came, even if they do disperse. Instances to the contrary might be cited.

Having now, gentlemen of the jury, stated my opinion in the best manner in my power on the law, independent of the facts, or the particular application of that law to the prisoner at the bar, I shall, agreeably to my duty, state to you in the best manner I am capable of, the nature of the issue which you are now called upon to determine. It is an issue of an aspect the most awful and important that any juror can ever be called upon to determine. It is your duty to divest yourselves of all manner of prejudice and partiality one way or the other. Dismiss from your minds, as much as you can, all of which you might have heard or thought on this case before you came into this court, and confine your opinions merely to the evidence which has been produced. No extraneous circumstances whatever ought to have the least weight with you in giving your verdict. You ought not, and I hope you will not, take into your consideration at all whether the safety of the United States requires that the prisoner should suffer, on the one hand, or whether, on the other, it may be more agreeable to your feelings that he should be acquitted. It is solely your duty to say whether he is guilty of the crime charged to him or not. No man can

conceive that the interest of any government can possibly make it requisite to sacrifice any innocent man, and I can rest perfectly satisfied, which I have no doubt you also are, that this government will not, and God forbid any considerations whatever should ever influence such an action.

I do not think it necessary to go into a minute detail of all the evidence which has been produced; it would be only mispending time. The general scenes which passed at Bethlehem must be fully in your mind; these scenes are supported upon the evidence of twelve witnesses. But I think it my particular duty to bring to your recollection those parts of that transaction in which the prisoner at the bar was concerned, leaving the rest as much as possible out of view. On this occasion I must request the gentlemen of the bar, if in any instance I should err in stating the evidence, that they will correct me; but I shall endeavor to be accurate.

The JUDGE here stated the prominent features of the evidence given by Messrs. Henry, John Barnet, William Barnet, Winters, Col. Nichols, Schlaugh, Horsefield, Eyerly, Toon and Mitchel, so far as related to the conduct of the prisoner at Bethlehem, which, he said, he thought proper to state first, because the offense charged in the indictment was said to have been committed at Bethlehem. Gentlemen, he continued, if you are not well satisfied that the overt act of treason was committed at Bethlehem, and that that overt act is supported by the evidence of two witnesses at least, you will not find the prisoner guilty.

Now, gentlemen, is the proper time for me to state one or two points concerning the law of evidence, of which you have heard much from the bar. As I observed, there must be two at least to prove that the act of treason was committed at Bethlehem. It is the opinion of the counsel for the prisoner that you must be convinced, not only of the fact by two witnesses; not only that he was concerned in a certain act; but that you must have the evidence of two witnesses, at least, by evidence drawn from the same place, that it was done with a treasonable intention, before you can pay any attention to any other evidence whatever. The fact is that, when

the overt act is proved by two witnesses, it is proper to go into evidence to show the course of the prisoner's conduct at other places, and the purpose for which he went to that place where the treason is laid, and if he went with a treasonable design, then the act of treason is conclusive. In this I am supported by a very respectable authority on crown law, Foster, in the case of Deacon, from which it appears that it is enough, to prove that a rebellious assembly of armed men were there, and that the prisoner joined them. In order to prove to you fully the design with which the prisoner went to Bethlehem and joined in this great outrage, I shall select some of the evidence respecting those previous transactions; it is not necessary to state the whole.

(The JUDGE here read the evidence of James Chapman, John Rodrick, Cephas Childs and William Thomas, respecting the conduct of Jacob Fries on the 5th of March, and respecting the meeting with Foulke and Rodrick near Singmaster's; and also the transactions of the 6th, at Quaker town, which evidence, he said, so confirmed each other, that no doubt could be entertained.)

We now come to the confession of the prisoner, voluntarily made on his examination before Judge Peters. Here is a point of law relied on by the prisoner's counsel—that no man should be convicted of treason but on the evidence of two witnesses, or upon confession in open court. This is the provision in England as well as here, and the meaning is, that no confession of the prisoner, independent of two witnesses, or without the facts have been established by two witnesses, should be sufficient to convict him: but if two witnesses have proved a fact the confession of the party may be received by way of confirmation of what has before been sworn to. In former days in England, it was allowed that confession out of court, and the proof of the witnesses, should be sufficient to warrant a conviction; but happily our Constitution would not admit it, if a hundred would swear to it; that danger is wisely avoided. Instances enough are in the recollection of the court, of a civil and criminal nature, where confessions have been received; but the jury are to judge from other evidence how far that is to be regarded.

Evidence may sometimes be given which may be doubtful, and wants corroboration; you will judge whether that is or is not the case at present. But if the confession of the prisoner should go to confirm the evidence, if sworn to by two witnesses at least, it may be received, but unless it does go to corroborate other testimony, I do not think it admissible. You will consider whether any part of this confession has not before been proved by two witnesses: if it has, it goes to corroborate what they say; if it has not, you are to disregard it. I think there ought to be great caution in receiving, as evidence, a confession which any man makes himself, because it possibly might be obtained from him by artifice or intimidation: with respect to this confession, you have the testimony of my honorable colleague, Judge Peters, that he gave the prisoner deliberate warning that he was not bound to convict himself, and that no intimidation was used. Whatever objections, then, there may be as to confession in general, it does not apply in this case, because it was voluntarily given.

The prisoner on his part introduced some witnesses, thinking they would be favorable to him: one of them appeared to be so in his testimony, which I shall endeavor to relate; the other three did not answer his expectation.

With regard to the point of law stated respecting the sufficiency of the warrants, the evidence to this fact shows the general disposition of that part of the country to resist the execution of the law, and prevent it by force or intimidation; our means of showing that, is their conduct towards the assessors. Those who were appointed to that office, so far as they had it in their power, showed a disposition to act as such. It is contended that their warrant ought to have been produced. With respect to the blank commission, which there was a suspicion was unlawfully filled up, there ought to have been the books produced; but it was not material. This indictment, it will be observed, is not for any resistance to the assessors, or obstruction of them in the discharge of their duty. I suppose it is not necessary to show that these officers were *de facto* engaged in the execution of the law;

that they were considered as assessors; and that no doubt ever was entertained that they were properly authorized to be assessors. This doubt, if there was any, could be removed by reference to a very respectable authority. It was sufficient if the warrants, given under the seal of the commissioner, were produced to the court.

As to the objection respecting Mr. Foulke's appointment in the place of Mr. Clarke, this was not material, since the warrant was filled and he acted under it.

With respect to another point of objection stated at the bar, that the marshal, in detaining the two men at Bethlehem, was liable to an action, he said that, under the circumstances of that period, he could not, because, under certain circumstances, he was warranted to call out the *posse comitatus*, i. e., the power of the county, to assist him, if he was likely to be overpowered: it could not be presumed that the circumstance did not empower and warrant him to call them out, and therefore we may conclude that danger was really to be apprehended, and those apprehensions must be heightened by the arrival of those two men in arms. In the opinion of Judge Henry, who was present, the danger was such as to justify the act of detention of those two men. Was it with a view of depriving these men of their liberty? No; but supposing them to have come with intent to assist in the rescue which they acknowledged they had heard was contemplated.

Gentlemen, in looking to the law on this point, I do not think it is encroaching at all upon the liberty of any man to take him in custody. An officer in such an action must be at his peril, and could only be justified on the exigency of the circumstance: if he did it unnecessarily, a jury would teach him to take care how he sported with the liberties of his fellow-citizens; but supposing, from good evidence, that he was in danger of assault, if he waited the united force of the assailants, shall it be contended as unreasonable, that the marshal should take measures of self-defense while it was in his power, and detain what he might reasonably suppose a

part of them? He surely acted the part of a prudent man, and was justifiable in the act.

Before I dismiss this general subject, I think it an indispensable duty which I owe, to declare that, excepting the single instance, wherein I do perceive some impropriety of conduct, in the filling up the blank commission, what has been disclosed in the course of this examination of the conduct of the commissioners or assessors, has reflected on those officers the greatest honor: at the same time they acted with industry, fidelity, and firmness, in the discharge of that duty, they did all in their power to make it easy to the people, accommodating themselves to endeavor to give full satisfaction, undeceiving the deluded, and removing the errors which the people had fallen into. If the people still continued in ignorance and opposition, those gentlemen acquitted themselves of blame, and their conduct merited high praise.

As to the plea of ignorance, the law says ignorance shall excuse no man; otherwise, how could it be possible to prove whether a person knew the law or not? If ignorance could excuse a man for crimes, no crime would be brought to justice, or there must be, what is not to be expected, some self-evident proof of the guilt. A complete knowledge of the laws cannot be expected in every corner of our country; but thus much we may say, to remove this kind of excuse. If a man does not know when a law is passed, he knows how to obtain that information, and the law itself; for if he cannot come to Philadelphia, or some other town where they may be purchased by himself, he has opportunity of sending from time to time. But in the present case, any doubt could have been removed by application to the assessors, who were ever ready and willing to show the law, and therefore no plea of ignorance can possibly be set up.

Having spoken in commendation of the conduct of the commissioners and assessors, perhaps it is also my duty to say that the conduct of the marshal has been equally exemplary: he did everything in his power, by fair and honorable means, to avoid going to extremity, and as long as he had a hope of retaining his prisoners, he displayed a degree

of courage which few men would do. He even offered to expose his life to this armed mob, by proceeding with the prisoners to Philadelphia, which he would have done but for the advice of three or four gentlemen with him, who thought it madness to proceed. He accordingly desisted, and in the event delivered up the prisoners.

This trial has lasted so many days, that we must be all very much fatigued; and I declare, gentlemen, I have scarce had power to examine the various points with minute attention, much less to prepare so proper a statement of them as I intended to have done. The fatigue I have felt many nights at going out of this court has prevented me doing it. Under these circumstances, I have no doubt of your excuse, which I shall the more readily meet, since your fatigue must also be very great.

Gentlemen of the Jury: The occasion is undoubtedly the most awful and important that ever could arise in any country whatever: the great question for you to decide is, whether the prisoner has been guilty of levying war against the United States at Bethlehem, in the county of Northampton, as charged in the indictment, or not. In order to discover the nature of his conduct, you must examine into the motive with which he went to Bethlehem: it is necessary for you to examine the whole of his previous actions relating thereto: if it should appear to you that the prisoner formed a scheme, either on the way or at Bethlehem, by any kind of force, to obtain this object, then, in my opinion, you ought to declare him guilty of the charge laid in the indictment. On the contrary, if you think he had no public and evil motive in view, he is not guilty of the crime.

Before I dismiss you, gentlemen, I would remind you of one consideration which must impress your minds. A great and important end of bringing persons guilty of public crimes to justice is to preserve inviolate the laws of our country. Men who commit crimes ought to be punished; otherwise no safety or security can be had. On the other hand, it is of consequence that no man's life shall be taken away unjustly. If a man is not guilty of a crime, he ought not to

be punished for it; and it cannot be for the interest of the country to put a man to death for what he has not committed: therefore you are not to regard the consequences, but determine merely by the facts in a manner for which you will be answerable at a future day, as well as myself, for all the conduct of our lives, as well as for the verdict you now give.

*Mr. Lewis* stated a question to the court, whether the overt act laid in the indictment in a certain county, must not be proved to the satisfaction of the jury, both as to fact and intention, in the same county, or whether the overt act did not include both fact and intention.

JUDGE IREDELL considered Foster's crown law as settling that point. When two witnesses are produced, which proves the overt act laid in the indictment, there might be then evidence drawn from other counties respecting the intention. This is the opinion of Judge Foster, and it is my opinion. But there is another thing: it goes to a point which is inadmissible; it is not for the court to say whether there was a treasonable intention or act as charged in the indictment; that is for the jury to determine; we have only to state the law—we therefore should have no right to give our opinion upon it. Again, if no evidence could regularly be admitted out of the county until both the fact and intention were established where the crime is laid, the consequences would be, that there ought to be some way of taking the opinion of the jury, whether they believed that the crime was committed at Bethlehem, before the court could proceed to extraneous testimony! This cannot be done; a jury must give verdict upon all the evidence collectively; if the evidence is admitted, then the jury is bound to respect the weight of it. The competency of that evidence is for the court to decide, but the jury must estimate its weight.

The question for you to decide at this time, gentlemen of the jury, is, whether, upon the testimony of two witnesses, there is ground to believe the act was committed; and whether, from the prisoner's conduct at Bethlehem or elsewhere, it is proved to be with a treasonable intention.

JUDGE PETERS. I think the overt act and the intention constitute the treason; for without the intention the treason is not complete. If a man goes for a private purpose, to gratify a private revenge, and not with a public or general view, it differs materially. The intention may possibly be gathered at the place where the act was committed, or it may not; if not, evidence is admissible to prove it elsewhere.



## THE VERDICT.

The *Jury* then withdrew, and the court adjourned for about three hours, when they returned with the verdict *Guilty*.

May 14.

The *Prisoner* was brought into court to receive sentence.

Mr. *Lewis* moved for a new trial on the ground that John Rhoad, one of the jurymen, had declared a prejudice against the prisoner after he was summoned as a juror. He read depositions and called witnesses who testified that Rhoad had declared, at two separate occasions, after his being summoned on the jury, but before the trial, that Fries, the prisoner, "ought to be hung;" "that it would not be safe at home unless they hung them all;" etc. Rhoad himself was afterward called by the *District Attorney*, and denied under oath that he had made use of the expressions imputed to him, or any other of a similar character. Some testimony, also, was produced for the purpose of showing his veracity and general good character.

The COURT held that a new trial should be granted. JUDGE IREDELL delivering the opinion and JUDGE PETERS concurring in the following language: Although I am not perfectly satisfied with the testimony, which is contradicted by the juror on his oath, I will allow it to be taken for granted, and meet the question on principle. I am in sentiment against granting the motion for a new trial. Because 1. The juror said no more than all friends to the laws and the government were warranting in thinking and saying as the facts appeared then to the public. Fries being generally alleged to be the most prominent character, it was on this account, and not with special or particular malice, that Rhoad's declaration was made.

2. If a juror was rejected on account of such declarations, trials, where the community at large are intimately affected by crimes of such general importance and public notoriety, must be had, in all probability, by those who only openly or secretly approved of the conduct of criminals. This would be unjust and improper, as it affects the government in its public prosecutions. Little success could be expected from proceedings against the most atrocious offenders, if great multitudes were implicated in their delusions or guilt.

3. It is natural for all good citizens, when atrocious crimes, of a public nature, are known to have been committed, to express their abhorrence and disapprobation both of the offenses and the perpetrators. It is their duty to express themselves. This is not like the case of murder, or any offense against an individual; or where several are charged, and none remarkably prominent. In this latter case, selecting one out of the mass might evince particular malice.

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4. I have no doubt that declarations of an opposite complexion could be proved; and yet the jurors were unanimous in their verdict. The defendant has had a fair, and I think an impartial trial.

But as a division in the court might lessen the weight of the judgment if finally pronounced, and the great end of the law in punishments being example, I, with some reluctance, yield to the opinion of Judge Iredell. Although justice may be delayed, yet it will not fail, either as it respects the United States or the prisoner.

## THE SECOND TRIAL OF JOHN FRIES FOR TREASON, PHILADELPHIA, PENN- SYLVANIA, 1800.

### THE NARRATIVE.

The second trial of John Fries was much briefer than the first one and the result was the same. The jury found him guilty as charged in the indictment and he was sentenced to be hanged.

But this trial has an historical importance which the first one did not have; for the presiding judge, Samuel Chase, was afterwards impeached before the Senate of the United States for the manner in which he conducted it. He began by reading to the prisoner's counsel his view of the law and plainly told them that there was no use their arguing to the jury their views as to what was treason, as his mind was fully made up on the question. Nor would he allow counsel to refer to English authorities, which he declared had no application in this country. The lawyers for Fries protested, but it did no good and so they both withdrew from the case and when the court opened the next morning the prisoner was without counsel and though the judge offered to furnish them for him, his offer was declined and the prisoner conducted his own defense.

### THE TRIAL.<sup>1</sup>

*In the United States Circuit Court, Philadelphia, Pennsylvania, April, 1800.*

HON. SAMUEL CHASE,<sup>2</sup>  
HON. RICHARD PETERS,<sup>3</sup> } *Judges.*

*April 22.*

The *Prisoner* was arraigned for the second time and pleaded *not guilty* to the indictment for high treason.

<sup>1</sup> *Bibliography.* See *ante*, p. 4.

<sup>2</sup> See 10 Am. St. Tr. 778.

<sup>3</sup> See 4 Am. St. Tr., 616.

*William Rawle*<sup>4</sup> and *Jared Ingersoll*,<sup>5</sup> for the Government.

*William Lewis*<sup>6</sup> and *Andrew J. Dallas*,<sup>7</sup> for the Prisoner.

JUDGE CHASE. The Court has deliberately considered the indictment against John Fries for treason, and the three several overt acts of treason stated therein. The crime of treason is defined by the Constitution of the United States; as the Federal legislature has the power to make, alter, or repeal laws, so the judiciary only has the power, and it is their duty, to declare, expound, and interpret, the Constitution and laws of the United States. It is the duty of the Court, in all criminal cases, to state to the petit jury their opinion of the law arising on the facts; but the jury, in all criminal cases, are to decide both the law and the facts, on a consideration of the whole case. There must be some constructive exposition of the terms used in the Constitution, 'levying war against the United States.' That the question, what acts amounted to levying war against the United States, or the government thereof, is a question of law, and had been decided by Judges Paterson and Peters, in the cases of Vigol and Mitchell, and by Judges Iredell and Peters, in the case of John Fries, prisoner at the bar, in April, 1799. Judge Peters remained of the same opinion, which he had twice before delivered, and he, this respondent, on long and great consideration, concurred in the opinion of Judges Patterson, Iredell and Peters. To prevent unnecessary delay, and to save time on the trial of John Fries, and to prevent a delay of justice in the great number of civil causes depending for trial at this term, the court has drawn up in writing their opinion of the law, arising on the overt acts, stated in the indictment against John Fries; and has directed David Caldwell, their clerk, to make out three copies of their opinion, one to be delivered to the attorney of the district, one to the counsel for the prisoner, and one to the petit jury, after they have been impanelled and heard the indictment read to them by the clerk, and after the District Attorney has stated to them the law on the overt acts alleged in the indictments, as it appeared to him.

The opinion was handed to *Mr. Lewis*, who read part of it, and then threw it on the table.<sup>8</sup>

<sup>4</sup> See 4 Am. St. Tr., 624.

<sup>5</sup> See 4 Am. St. Tr., 625.

<sup>6</sup> See *ante*, p. 6.

<sup>7</sup> See 7 Am. St. Tr., 679.

<sup>8</sup> The paper containing the opinion of the court, as handed to the counsel for the defense, is as follows:

The prisoner, John Fries, stands indicted for levying war against the United States. The constitutional definition of treason is a question of law. Every proposition in any statute (whether more or less distinct—whether easy or difficult to comprehend), is always a question of law. What is the true meaning and true im-

JUDGE CHASE. Are counsel ready to proceed?

*Mr. Lewis* said that there were no doubts as to the facts, and as the Court had made up their minds as to the law, he did not expect that he should be able to change them; and that he should decline acting as counsel for Fries.

*Mr. Dallas* said he agreed with his colleague.

JUDGE PETERS (to JUDGE CHASE). I told you so; I knew they would take the stud.

*April 23.*

JUDGE CHASE. Gentlemen, are you ready to proceed?

*Mr. Rawle.* The prosecution is ready.

*Mr. Lewis* said that if he had been employed by the prisoner, he would think himself bound to proceed; but having been assigned as his counsel—

JUDGE CHASE. You are not bound by the opinion delivered yesterday, but are at liberty to contest it on both sides.

*Mr. Lewis* answered, that he had understood that the Court had made up their minds as to the law, and as the prisoner's counsel had a right to address the jury both on the law and the fact, it would place him in too degrading a situation to argue the case after what had passed, and, therefore, he would not proceed with the defense.

JUDGE CHASE. You are at liberty to proceed as you think proper. Address the jury and lay down the law as you think proper.

*Mr. Lewis.* I will never address myself to the Court upon a question of law in a criminal case. *Mr. Lewis* then went into a lengthy

port of the statute, and whether the case stated comes within the statute, is a question of law, and not of fact. The question on an indictment for levying war against (or adhering to the enemies of), the United States, is "whether the facts stated do not amount to levying war."

It is the duty of the court in this, and in all criminal cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide on the present, and in all cases, both the law and the facts, on their consideration of the whole case.

The court heard the indictment read on the arraignment of the prisoner, some days past, and just now on his trial, and they attended to the overt acts stated in the indictment.

It is the opinion of the court that any insurrection or rising of any body of people, within the United States, to attain or effect, by force or violence, any object of a great public nature, or of public and general (or national) concern, is a levying war against the United States, within the contemplation and Constitution of the United States.

On this general position, the court are of opinion that any such insurrection or rising to resist or to prevent by force or violence, the execution of any statute of the United States for levying or col-

argument upon the law of high treason in England, previous to their revolution, and contended that the courts, since that period, had considered themselves as bound by those decisions which were made prior to it.

JUDGE CHASE. The counsel must do as they please.

*Mr. Dallas* said his determination was not to proceed as counsel for Fries.

JUDGE CHASE. No opinion has been given as to the facts of the case. I would not suffer the witnesses against those persons charged with seditious combinations, to be examined before the trial of Fries came on, lest their evidence might have been heard by some of the jury. As to the law, I know that the trial before took a considerable time, and that cases at common law, and decisions in England before the Revolution on the law of treason, such as the case of the man whose stag they killed, and wished the horns of the stag in the king's belly, and the case of the innkeeper, who kept the sign of the crown, and who said he would make his son heir to the crown. These cases ought not, and shall not, go to the jury. There is no case which can come before me on which I have not a decided opinion as to the law; otherwise I should not be fit to preside here. I have always conducted myself with candor, gentlemen, and meant to have saved you trouble by what I did. Is it not respectable for counsel to say that they have a right to offer what they please to the jury? What! would you cite decisions in Rome, in Turkey or in France? You will now proceed, and stand acquitted or condemned in your own consciences as you

lecting taxes, duties, imposts or excises; or for any other purpose (under any pretense, as that the statute was unequal, burdensome, oppressive, or unconstitutional), is a levying war against the United States within the Constitution.

The reason for this opinion is, that an insurrection to resist or prevent by force the execution of any statute, has a direct tendency to dissolve all the bonds of society, to destroy all order and all laws, and also all security for the lives, liberties, and property of the citizens of the United States.

The court are of opinion that military weapons (as guns and swords, mentioned in the indictment), are not necessary to make such insurrection or rising amount to levying war, because numbers may supply the want of military weapons; and other instruments may effect the intended mischief. The legal guilt of levying war may be incurred without the use of military weapons, or military array.

The court are of opinion that the assembling bodies of men, armed and arrayed in a war-like manner, for purposes only of a private nature, is not treason, although the judges and peace officers should be insulted or resisted, or even great outrage committed to the persons and property of our citizens.

The true criterion to determine whether acts committed are a

conduct the defense, and go on in your own way. The case will be opened by the attorney—the manner must be regulated by the Court.

JUDGE PETERS. The papers were all withdrawn.

*Mr. Lewis.* The paper was withdrawn, but the impressions remained with the jury; I, therefore, could not act.

JUDGE CHASE said: You can't bring the Court into difficulties, gentlemen; you do not know me if you think so. Are you ready for trial, or do you wish other counsel assigned?

*Fries* replied that he did not know what to do.

*Mr. Rawle.* As this is a remarkable case, I hope the trial will be postponed until next day.

April 24.

JUDGE CHASE. Prisoner at the bar, do you desire counsel assigned you?

*Fries.* No. I will look to the Court to be my counsel.

JUDGE CHASE. Then by the blessing of God, the Court will be your counsel, and will do you as much justice as those who were your counsel.

The jury were then called, and JUDGE CHASE took pains to inform *Fries* of his right to challenge, and that he might challenge thirty-

treason or a less offense (as a riot) is *quo animo* the people did assemble. When the intention is universal or general, as to effect some object of a general public nature, it will be treason, and cannot be considered construed or reduced to a riot. The commission of any number of felonies, riots or other misdemeanors, cannot alter their nature, so as to make them amount to treason; and, on the other hand, if the intention and acts combined amount to treason, they cannot be sunk down to a felony or riot. The intention with which any acts (as felonies, the destruction of houses, or the like) are done, will show to what class of crimes the case belongs.

The court are of opinion that, if a body of people conspire and meditate an insurrection, to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war; and the quantum of the force employed neither lessens nor increases the crime—whether by one hundred or one thousand persons, is wholly immaterial.

The court are of opinion, that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war, but that it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war.

five without showing any cause, and as many more as he could show cause against.

After they had been passed by *Fries*, JUDGE CHASE asked them (under oath): Are you in any way related to the prisoner. They all answered, No. Have you ever formed or delivered an opinion as to the guilt or innocence of the prisoner, or that he ought to be punished. Some of them said they had given their sentiments generally, disapprobatory of the transaction, but not as to the prisoner particularly. These were admitted. One juror (Taggart) after he was sworn told the court that he was uneasy under his oath; he had then so meant that he never had made up his mind that the prisoner should be hung, but very often had spoken his opinion that he was very culpable; he did not, when he took the oath, conceive it so strict, and therefore wished, if possible, to be excused. The COURT informed the juror it was impossible to excuse him, now he was sworn.

Thirty-four jurors were challenged and the following selected and sworn: Samuel Wheeler (foreman), Henry Pepper, John Taggart, Cornelius Comegys, Ephriam Clark, Thomas Baily, Lawrence Cauffman, John Edge, Charles Deshler, Henry Dubois, Isaac Dehaven, John Balliot.

#### MR. RAWLE'S OPENING SPEECH.

*Mr. Rawle* said that the jury must be aware of the very unpleasant duty he had to perform: he felt an extreme difficulty of situation—called forth by his duty to exhibit a charge against the prisoner at the bar of the highest magnitude, who now stood to answer, unattended by any legal advice; he felt impressed with the necessity of sticking more than usually close to the line of his duty, which he should endeavor to discharge as faithfully as possible. And he trusted that, while the jury felt their relation to their unfortunate fellow-citizen at the bar, they would, at the same time, make all suitable allowance for any errors which might appear on his part, though it was sincerely his desire to avoid any, either in laying down the facts or the law, which he should do under the direction of the court; and he hoped that the jury would carefully sift and examine the law and testimony which his duty called upon him to advance, in order to substantiate the charge.

He should be able to prove, that John Fries, the prisoner



at the bar, did oppose the execution of two laws of the United States, to effectuate which he was provided with men, who, as well as himself, were armed with guns, swords, and other warlike weapons, which, by their numbers and military appearance, were sufficient to accomplish their purpose, which was, not only to intimidate the officers of the government appointed to execute the above laws themselves, but to release from the custody of the Marshal of Pennsylvania a number of persons who were held in prison by the said marshal, and to prevent him executing process upon others. All this was done, as stated in the indictment, by a combination and conspiracy to oppose those laws, by a large body of armed men, of whom the prisoner at the bar was the chief, and commander.

The treason whereof the prisoner was charged was, "levying war against the United States." U. S. Const., Art 3, Sec. 3. What was levying war against the United States?

He conceived himself authorized, upon good authority, to say, levying war did not only consist in open, manifest, and avowed rebellion against the government, with a design of overthrowing the Constitution; but it may consist in assembling together in numbers, and by actual force, or by terror, opposing any particular law or laws. Again, there can be no distinction as to the kind or nature of the law, or the particular object for which the law was passed, since all are alike the acts of the legislature, who are sent by the people at large to express their will. Force need not be used to manifest this spirit of rebellion, nor is it necessary that the attempts should have been successful, to constitute the crime. The endeavor, by intimidation, to do the act, whether it be accomplished or not, amounts to treason, provided the object of those concerned in the transaction, is of a general nature, and not applied to a special or private purpose.

In order to effect the object of those embarked in crimes of this high nature, it is well known that various means are necessarily employed; various acts may be perpetrated to accomplish the main end: they may proceed by the execu-

tion of some enormous crimes, as burglary, arson, robbery, or murder, either, or all of them; but even if one or all of these crimes were committed, except the purpose should be of a general nature, they may form distinct and heinous offenses; but the perpetrators may not be guilty of treason. If a particular friend of the party had been in the custody of the marshal; if even a number sufficient for the purpose should step forward and rescue such a person, if it was not with a view to rescue prisoners generally, it would amount to no more than a rescue; but, if general, it is treason. The views of the party fix the crime, and therefore only the design is necessary to be known.

To prove that this doctrine was well established in the United States, *Mr. Rawle* turned to 2 Dallas, 346 and 355, stating the opinions of the court in the cases of Vigol and Mitchel, charged with, and convicted for, treason. The attack on General Neville's house was of this general nature, because he was an officer appointed to execute the obnoxious law; and being to the officer and not to the man that they objected, it was thought to be treason, and that decision was well grounded.

He observed, that the clause in our Constitution was founded on a statute which was passed in England, to prevent the ever-increasing and ever-varying number of treasons, upon the general and undefined opposition to royal prerogative: the situation of things was such, previous to that period, as to call forth from the statesman, from the philosopher, and from the divine, even in those dark ages, the most vehement complaints: in attendance to these reasonable and just murmurs, the statute was passed.

JUDGE CHASE said, the court would admit, as a general rule, of quotations which referred to what constituted actual or constructive levying war against the King of Great Britain, in his regal capacity; or, in other words, of levying war against his government, but not against his person, because it was of the same nature as levying war against the United States would be applied here: so was that part called adher-

ing to the king's enemies:—they may, any of them, be read to the jury, and the decisions thereupon—not as authorities whereby we are bound, but as the opinions and decisions of men of great legal learning and ability. But even then, the court would attend carefully to the time of the decisions, and in no case must it be binding upon our juries.

*Mr. Rawle* quoted *Hawkins*, b. 1, Chap. 17, Sec. 23, as an authority of authenticity to prove, that not only those who rebelled against the king, by taking up arms with the avowed design of dethroning him, but those who withstood his lawful authority, and who endeavored to oppose his government; who withstood the king's forces, or attacked any of his fortresses—those, in fine, whose avowed object was of a public and general, and not of a private and personal nature, were guilty of high treason. He also read *Sir John Friend's* case from *Holt*, 681, and *Damarree and Pinchases' case*, 8 *State Trials*, 289.

JUDGE CHASE begged the counsel to read only those parts of the cases which referred to what could be treason in the United States, and nothing which related to compassing the king's death. It would be found, he observed, by an attention to the last case, that because the intention was a rising to demolish all meeting-houses, generally, it was considered to be an insurrection against the Toleration Act, by numbers and open force, setting the law at defiance. This would be found to be the opinion in *Foster*, 213.

*Mr. Rawle* said, that he conceived that, even if the matter made a grievance of, was illegal, the demolition of it in this way was, nevertheless, high treason, because of the people so assembled taking the law into their own hands; thus, in *Foster*, it would be seen that demolishing all bawdy-houses, as such, was high treason, as much as demolishing all meeting-houses, being equally an usurped authority. He also read *Douglas*, 570, *Lord George Gordon's case*, when it was *Lord Mansfield's* opinion that any attempt, by violence, to force the repeal of a law, or to prevent its execution, is levying war, and treason.

He considered, from those few authorities, that he was jus-

tifiable in saying that a rising, with intent by force to prevent the execution of a law, as well as laws in general, preventing the marshal executing his warrants, and preventing the other officers charged with the execution of the laws in question, amounted to levying war, agreeably to the Constitution of the United States.

*Mr. Rawle* then proceeded to state the most prominent facts which could be produced in the course of the evidence, in which it would fully appear, he presumed, that John Fries, the prisoner, was the most active in his opposition to those laws and to every attempt to carry them into effect; that he in every instance showed his aversion of, and opposition to, the assessors, and determination by threats and menaces to prevent them doing their duty, and that whenever any force was used, or terrific appearances held up, he was the commander, and gave the orders to his men, who, at times in great numbers, joined him: and that finally, by threats and intimidation, equally the same in the eyes of the law as force, he, the prisoner, did attain his object, to-wit, the release of a number of prisoners who were confined for opposing the execution of the law, and were actually in custody of the marshal in a house at Bethlehem, which, by reason of his having prisoners there, and his having an armed posse to protect his lawful authority, was to all intents a fortress of the United States; and further, that he did, completely for a time, prevent the execution of the laws intended, in those parts, and thus did bid defiance to all lawful authority.

JUDGE CHASE. John Fries, you will attend to all the evidence that will be brought against you; will attend to their examination, and ask any questions you please of the several witnesses, or of the court; but be careful to ask no questions wherein you may possibly criminate yourself, for remember, whatever you say to your own crimination, is evidence with the jury; but if you say anything to your justification, it is not evidence. The court will be watchful of you; they will check anything that may injure yourself. They will be your counsel, and give you every assistance and indulgence in their power.

## THE EVIDENCE.

The witnesses in the former trial repeated their testimony given then. In addition to these *Schmyer, James Williamson and Daniel Wiedner* gave testimony of so similar a character that it need not be set out here. *Christian Heckavetter, John Ramich, John Oswald, Isaac*

*Mr. Rawle.* I feel myself so very peculiarly situated in this case, that I would wish the opinion of the court. The unfortunate prisoner at the bar appeared to answer to a charge, the greatest that could be brought against him, without the assistance of counsel, or any friend to advise with. To me the evidence against the prisoner is extremely strong. It will be recollected that, in opening the evidence, I informed the jury what points I shall prove. I opened my ideas of constructive law, and produced a few authorities in support of my opinions. I believe it will be found that in no material point have I failed to substantiate what I first gave notice that I could prove. I therefore conceive the charges are fully confirmed.

But although, if this trial was conducted in the usual way, and counsel were ready to advocate the cause of the prisoner, it would now be proper, on my part, to sum up the evidence as produced to the jury, and apply it to the law, in order to see whether the crime was fixed or not. Under the present circumstances, I feel very great reluctance to fulfil what would, in other circumstances, be my bounden duty, lest it should appear to be going further than the rigid requisition of my office compels me to. I therefore shall rest the evidence and the law here, unless the court think that my office as public prosecutor, demands of me to do it, or that I should not fulfil my duty without doing it.

JUDGE CHASE. It is not unfrequent for a prisoner to appear in a court of justice without counsel, but it is uncommon for a prisoner not to accept of legal assistance. It is the peculiar lenity of our laws that makes it the duty of a court to assign counsel to the person accused. With respect to your situation, sir, it is a matter entirely discretionary with

you whether you will state the evidence and apply it to the law or not. There is great justice due to a prisoner arraigned on a charge so important as the present. There is great justice also due to the government. On the one hand, an innocent person shall not be made to suffer for want of legal assistance; on the other, a guilty person shall not escape through an undue indulgence, or the failure of the accuser in a duty his office may require of him. If you do not please to proceed, I shall consider it my duty to apply the law to the facts. The prisoner may therefore offer what he pleases to the jury.

*The Prisoner.* I submit to the court to do me that justice which is right.

JUDGE CHASE. That I will, by the blessing of God, do you every justice.

JUDGE PETERS. Mr. Attorney, while you are justifiable in considering the situation of the prisoner, that he might not suffer by any partial impressions you may make on the jury, there is another consideration deserving attention—there is justice due to the United States. Though I see no difficulty in resting it here, yet, possibly, persons who may have come into court since the trial commenced, may expect something of a narrative of the transactions, and such a narrative may be of great help to the jury. I wish it to be done for the due execution of public justice, and, God knows, I do it not with a desire to injure the prisoner, for I wish not the conviction of any man. It is a painful task, but we must do our duty. Still I think you are at liberty to fulfil your own pleasure.

*Mr. Rawle* would, then, under a solemn impression that it was his duty, take up some part of the time of the court and jury in relation to the prisoner at the bar, a task rendered far more painful on his part, from the circumstance of the prisoner's appearing there (unexpectedly) without counsel to plead his cause. In as few words as possible, he would endeavor to collect the most prominent features of the testimony which had been produced, and to apply it to the law.

As he stated before, *Mr. Rawle* said, levying war in the United States against the United States, was a crime defined by the Constitution; in relation to the republican form of gov-

ernment existing among us, it could only consist in an opposition to the will of the society, of which we all are members, declared and established by a majority; in short, an opposition to the acts of Congress, in whole or in part, so as to prevent their execution, either by collecting numbers, by a display of force, or by exhibiting that degree of intimidation which should operate, in either way, upon those charged with the execution of the law, either throughout the United States or in any part thereof, to procure a repeal or a suspension of the law, by rendering it impracticable to carry such law or laws into effect in the place so opposing, or in any other part. This offense he considered to be strictly treason against the United States.

The question, then, is, how far the case of the prisoner and his conduct merit this definition? In order to be informed of that, it was necessary to call to recollection the evidence, so collected, as to display the train and progress which marked its footsteps from its first dawning till its arrival at the fatal deed denominated treason.

It will first be observed by the testimony of several respectable witnesses (Messrs. Heckavelter, Ramich, Schymer, Ormond and Williamson), that attempts were made and executed, by a combination, in which, unfortunately for him, the prisoner at the bar was very active, to prevent the assessors from doing the duty required of them when they accepted their office, and that this combination existed both in Northampton and Bucks counties, and to such a degree that it was impossible to carry the law into effect. In Lower Milford, more particularly, we have the evidence of four respectable gentlemen (Mr. Chapman, a principal assessor, and Mr. Rodrick, Mr. Foulke and Mr. Childs, three assessors), who were employed in the execution of those laws. These gentlemen say that they met with such opposition at an early period of the insurrection, as deterred Samuel Clarke from undertaking the business at all, although he had taken upon him the office. From this difficulty, Messrs. Foulke, Rodrick and Childs determined that they would proceed to assess Lower Milford township together, which they attempted, and did

not desist until compelled by the extreme opposition which their respective testimony relates to have happened on the 5th and 6th of March, in their progress to, and at Quaker town, which ill usage is all corroborated by other witnesses. This spirit of opposition to the laws, as exhibited generally, is also related by Mr. Henry and Col. Nichols, the marshal, wherein it appears that process could not be served, and that witnesses could not be subpoenaed, being deterred from the threats made to them by this extensive combination; and that, in the serving of process, personal abuse was given, as well as to the assessors who attempted to execute the law. In short the law was prostrate at the feet of a powerful combination.

*Mr. Rawle* here called to view the occurrences in Bucks county, as deposed by Messrs. Foulke, Rodrick, Chapman, Thomas, Mitchel and Wiedner, exhibiting a disposition to insurrection by a great number of persons, and who engaged in its acts; he referred to the meeting at Jacob Fries', where John Fries, the prisoner at the bar, expressed himself as determining to oppose and continue hostile to the laws; also to the circumstance afterwards near Singmaster's, where Mr. Rodrick made his escape, and where, as well as at other times, the prisoner forbade those officers to proceed, under threats of personal danger. It appeared Mr. Rodrick had given offense, not by his conduct, but because he came from a distance of ten or twelve miles into that township to prosecute his duty. However, the assessors met the next day, but were stopped at Quaker town, where they were extremely abused. To be sure, while the prisoner at the bar was in the room, and whenever he was present, their abuse was suspended; when he absented himself, it was renewed. The papers were taken from Mr. Childs, and also from Mr. Foulke, but returned, because they were not the identical papers. Here it must be observed, in justice to the prisoner, that one more of his few good actions appeared, which he wished in his heart had been more numerous. Fries assisted Mr. Faulke to get out of the house the back way, and advised him to keep out of the way of the men.



On the evening of that day they went up to Miller's town the jury would call to mind the message delivered by John Dillinger for convening the meeting the next day; this message was the fruits of a consultation held at the house of Jacob Fries, after they left Quaker town, when they determined to proceed to Miller's town the next morning. The next morning they met and went on as far as Ritters, where it appeared they were stopped for a short period by young Marks, who had been sent forward, with information that the prisoners were gone on to Bethlehem. A doubt being started whether they would not be too late, it was debated, and at last determined to go forward. Of this latter opinion was the prisoner at the bar. It was in evidence that none of those people knew the prisoners whom they were going to release. This, Mitchel and others swore.

Here *Mr. Rawle* thought commenced the overt act in the indictment. Hitherto only the general opposition to the law, and the intention with which the after conduct was perpetrated, appeared. They proceeded to Bethlehem, and here the officer of militia, the man who derived his power from the people, the prisoner, Captain John Fries, whose duty it was to support the law and Constitution of the United States, made a most distinguished figure. At Bethlehem it appeared that the prisoner was to step forward to effect the surrender of the prisoners, and of course to lay prostrate the legal arm of the United States. These prisoners were in the lawful custody of the marshal; he had lawful process against them from the district judge; they were in the house appointed for their safe keeping until they should be removed; he kept guard over them, and in order to execute his office, he had provided, by virtue of the powers given to the sheriff in the several counties agreeable to law, an armed force called a *posse comitatus*, or the power of the county. This force (about sixteen or seventeen) he supposed sufficiently great to prevent the prisoners in his charge being liberated; it appeared, however, in the sequel that they were not sufficient for that purpose. The prisoner with an armed force arrived at Bethlehem, and proceeded on his mission to the marshal.

He had a sword when he marched his men into the town; but it appeared that he left it when he entered on his other business, to-wit, demanding the surrender of the prisoners; the marshal answered, that he could not deliver them up. John Fries then returned to his men; and from the testimony of Mitchel, Barnet and Schlaugh (this was an important part of his conduct), he said, "They must be taken by force; the marshal says he cannot deliver them up; if you are willing, we will take them by force. I will go foremost; if I drop, then take your own command." Words were followed by actions; they went into the house, and the prisoners were given up.

This was an unquestionable, full and complete proof of the commission of the overt act; and that overt act is high treason, as laid in the third and fourth counts of the indictment, to-wit, that they did by force prevent the marshal from executing lawful process to him directed; and, secondly, that they did deliver, and take from him certain persons, whom he had in lawful custody; and, further, this was done by force and arms, by men arrayed in a warlike manner, and by a number exceeding one hundred persons. This the indictment justly calls levying war and treason.

There was no doubt but the act of levying war was completed in the county of Bucks, independently of all those actions at Bethlehem; for there the prisoner and others were armed, and arrayed with all the appearances of war—with drums and fifes, and at times firing their pieces; and this to oppose the laws and prevent their execution; and there, by this force, they executed one, and the main part of their plan; they there did set the law at defiance. That was part of their grand object, and was done with a general, and not with a particular view, an essential ingredient in treason. Whether these actions were to be considered as a separate act of treason, or whether they were to evince the intentions of the party, it certainly must be considered as testimony, and such as must have an important weight towards the verdict.

Gentlemen, you will consider how far the individual wit-

nesses are deserving your credit. If you consider them worthy of being believed, and if the facts related apply to the law which I submitted to your consideration, and which, from the silence of the court, I think you must consider as accurate—if not, I shall stand corrected by the court—there can be but little doubt upon your minds, that the prisoner is guilty. If it be not so, in your opinion, you must find him otherwise.

I have endeavored to do my duty with integrity. I have advanced nothing but what appears to me to be clearly substantiated; but with you, gentlemen, and with the court, I leave the truth of the opinion.

The COURT. John Fries, you are at liberty to say anything you please to the jury.

The *Prisoner*. It was mentioned that I collected a parcel of people to follow up the assessors; but I did not collect them. They came and fetched me out of my house to go with them.

I have nothing to say, but leave it to the court.

#### JUDGE CHASE'S CHARGE.

JUDGE CHASE. Gentlemen of the jury: John Fries, the prisoner at the bar, stands indicted for the crime of treason, of levying war against the United States, contrary to the Constitution.

By the Constitution of the United States (Art 3, sec. 3), it is declared, "that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

By the same section it is further declared, "that no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court;" and that "the Congress shall have power to declare the punishment of treason."

Too much praise cannot be given to this constitutional definition of treason, and the requiring such full proof for conviction; and declaring, that no attainder of treason shall

work corruption of blood or forfeiture, except during the life of the person attainted.

This constitutional definition of treason is a question of law. Every proposition in any statute (whether more or less distinct, whether easy or difficult to comprehend) is always a question of law. What is the true meaning and true import of any statute, and whether the case stated comes within it, is a question of law, and not of fact. The question in an indictment for levying war against (or adhering to the enemies of) the United States, is, whether the facts stated do, or do not amount to levying war, within the contemplation and construction of the Constitution.

It is the duty of the court in this case, and in all criminal cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide on the present, and in all criminal cases, both the law and the facts, on their consideration of the whole case.

It is the opinion of the court, that any insurrection or rising of any body of the people, within the United States, to attain or effect by force or violence any object of a great public nature, or of public and general (or national) concern, is a levying of war against the United States, within the contemplation and construction of the Constitution.

On this general position the court are of opinion, that any such insurrection or rising to resist, or to prevent by force or violence, the execution of any statute of the United States, for levying or collecting taxes, duties, imposts, or excises; or for calling forth the militia to execute the laws of the Union, or for any other object of a general nature or national concern, under any pretense, as that the statute was unjust, burthensome, oppressive, or unconstitutional, is a levying war against the United States, within the contemplation and construction of the Constitution. The reason for this opinion is, that an insurrection to resist or prevent, by force, the execution of any statute of the United States, has a direct tendency to dissolve all the bands of society, to destroy all order and all laws, and also all security for the lives, liberties and property of the citizens of the United States.

The court are of opinion that military weapons (as guns and swords, mentioned in the indictment) are not necessary to make such insurrection or rising amount to a levying war, because numbers may supply the want of military weapons, and other instruments may effect the intended mischief. The legal guilt of levying war may be incurred without the use of military weapons or military array.

The court are of opinion that the assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges, or other peace officers, should be insulted or resisted, or even great outrages committed to the persons or property of our citizens.

The true criterion to determine whether acts committed are treason, or a less offense (as a riot), is the *quo animo*, or the intention, with which the people did assemble. When the intention is universal or general, as to effect some object of a general public nature, it will be treason, and cannot be considered, construed, or reduced to a riot. The commission of any number of felonies, riots, or other misdemeanors, cannot alter their nature, so as to make them amount to treason; and, on the other hand, if the intention and acts combined amount to treason, they cannot be sunk down to a felony or riot. The intention with which any acts (as felonies, the destruction of property, or the like) are done, will show to what class of crimes the case belongs.

The court are of opinion, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war, and the quantum of the force employed neither lessens nor increases the crime—whether by one hundred or one thousand persons, is wholly immaterial.

The court are of opinion, that a combination or conspiracy to levy war against the United States is not treason, unless

combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used, in pursuance of such design to levy war; but that it is altogether immaterial whether the force used is sufficient to effectuate the object—any force connected with the intention will constitute the crime of levying war.

This opinion of the court is founded on the same principles, and is, in substance, the same as the opinion of the Circuit Court for this district, on the trials (in April, 1795) of Vigol and Mitchell (see *post*, p. 631), who were both found guilty by the jury and afterwards pardoned by the late President.

At the Circuit Court for the district (April term, 1799), on the trial of the prisoner at the bar, Judge Iredell delivered the same opinion, and Fries was convicted by the jury.

To support the present indictment against the prisoner at the bar, two facts must be proved to your satisfaction:

First. That some time before the finding of the indictment, there was an insurrection (or rising) of a body of people in the County of Northampton, in this State, with intent to oppose and prevent, by means of intimidation and violence, the execution of a law of the United States, entitled, "An Act to provide for the valuation of lands and dwelling houses, the enumeration of slaves within the United States," or, of another law of the United States, entitled, "An Act to lay and collect a direct tax within the United States;" and that some acts of violence were committed by some of the people so assembled, with intent to oppose and prevent, by means of intimidation and violence, the execution of both, or of one of the said laws of Congress.

In the consideration of this fact, you are to consider and determine with what intent the people assembled at Bethlehem, whether to effect, by force, a public or a private measure.

The intent with which the people assembled at Bethlehem, in Northampton, is a necessary ingredient to the fact of assembling, and to be proved like any other fact, by the declarations of those who assembled, or by acts done by them.

When the question is, "What is a man's intent?" it may be proved by a number of connected circumstances, or by a single fact.

If, from a careful examination of the evidence, you shall be convinced that the real object and intent of the people assembled at Bethlehem was of a public nature (which it certainly was, if they assembled with intent to prevent the execution of both of the above-mentioned laws of Congress, or either of them), it must then be proved to your satisfaction, that the prisoner at the bar incited, encouraged, promoted, or assisted in the insurrection or rising of the people at Bethlehem, and the terror they carried with them, with intent to oppose and prevent, by means of intimidation and violence, the execution of both the above-mentioned laws of Congress, or either of them; and that some force was used by some of the people assembled at Bethlehem.

In the consideration of this fact, the court think proper to assist your inquiry by giving you their opinion.

In treason, all the *participes criminis* are principals; there are no accessories to this crime. Every act which in the case of felony, would render a man an accessory, will, in the case of treason, make him a principal. To render any person an accomplice and principal in felony, he must be aiding and abetting at the fact; or ready to afford assistance, if necessary. If a person be present at a felony, aiding and assisting, he is a principal. It is always material to consider whether the persons charged are of the same party, upon the same pursuit, and under the expectation of mutual defense and support. All persons present, aiding, assisting, or abetting any treasonable act, are principals. All persons, who are present and countenancing, and are ready to afford assistance, if necessary, to those who actually commit any treasonable act, are also principals. If a number of persons assemble and set out upon a common design, as to resist and prevent, by force, the execution of any law, and some of them commit acts of force and violence, with intent to oppose the execution of any law, and others are present to aid and assist, if necessary, they are all principals. If any man joins and

acts with an assembly of people, his intent is always to be considered and adjudged to be the same as theirs; and the law in this case judgeth of the intent by the fact. If a number of persons combine or conspire to effect a certain purpose, as to oppose, by force, the execution of a law, any act of violence done by any one of them, in pursuance of such combination, and with intent to effect such object, is, in consideration of law, the act of all who are present when such act of violence is committed. If persons collect together to act for one and the same common end, any act done by any one of them, with intent to effectuate such common end, is a fact that may be given in evidence against all of them; the act of each is evidence against all concerned.

I shall not detain you at this late hour to recapitulate the facts. You have taken notes, and they have been stated with accuracy and great candor by Mr. Attorney.

I will only remark, that all the evidence relative to transactions before the assembling of the armed force at Bethlehem are only to satisfy you of the intent with which the body of the people assembled there. If either of the three overt acts (or open deeds) stated in the indictment, is proved to your satisfaction, the court are of opinion, that it is sufficient to maintain the indictment; for the court are of opinion that every overt act is treasonable.

As to accomplices—they are legal witnesses, and entitled to credit, unless destroyed by testimony in court.

If, upon consideration of the whole matter (law as well as fact), you are not fully satisfied, without any doubt, that the prisoner is guilty of the treason charged in the indictment, you will find him not guilty; but if, upon consideration of the whole matter (law as well as fact), you are convinced that the prisoner is guilty of the treason charged in the indictment, you will find him guilty.

#### THE VERDICT AND SENTENCE.

The *Jury* retired, for the space of two hours, and brought in their verdict, *Guilty*.

JUDGE CHASE addressed the prisoner, observing that, as he



had no counsel on the trial, if he, or any person for him, could point out any flaw in the indictment, or legal ground for arrest of judgment, ample time would be allowed for that purpose.

*May 2.*

The COURT called Charles Deshler, a juror, who, on the first evening of the said trial, on the adjournment of the court, separated from the jury and retired to his lodgings. Mr. *Hopkinson*, on behalf of Mr. Deshler, produced his own affidavit, and that of two others, which proved that on the said evening, Charles Deshler was inadvertently separated from his brethren by the crowd, in going out of the jury box; that he did not know to what place the jury had adjourned; that he then proceeded to his lodgings, where he cautiously avoided all conversation respecting the trial depending.

The COURT, satisfied by this representation of the innocence of Mr. Deshler, ordered that he be discharged, and that the before-mentioned affidavit be entered on the record of the court.

The *prisoner* being set at the bar, JUDGE CHASE, after observing to the other defendants that what he had to say to Fries, would apply generally to them, proceeded: John Fries, you have been already informed that you stood convicted of the treason charged upon you by the indictment on which you have been arraigned, of levying war against the United States. You have had a legal, fair and impartial trial, with every indulgence that the law would permit. Of the whole panel, you peremptorily challenged thirty-four, and with truth I may say, that the jury who tried you were of your own selection and choice. Not one of them before had ever formed and delivered any opinion respecting your guilt or innocence. The verdict of the jury against you was founded on the testimony of many creditable and unexceptional witnesses. It was apparent from the conduct of the jury, when they delivered their verdict, that if innocent, they would have acquitted you with pleasure; and that they pronounced their verdict against you with great concern and

reluctance, from a sense of duty to their country, and a full conviction of your guilt.

The crime of which you have been found guilty is treason; a crime considered, in the most civilized and the most free countries in the world, as the greatest that any man can commit. It is a crime of so deep a dye, and attended with such a train of fatal consequences, that it can receive no aggravation; yet the duty of my station requires that I should explain to you the nature of the crime of which you are convicted; to show the necessity of that justice which is this day to be administered, and to awaken your mind to proper reflections and a due sense of your own condition, which, I imagine, you must have reflected upon during your long confinement.

You are a native of this country—you live under a constitution (or form of government) framed by the people themselves; and under laws made by your representatives, faithfully executed by independent and impartial judges. Your government secures to every member of the community equal liberty and equal rights; by which equality of liberty and rights, I mean, that every person, without any regard to wealth, rank or station, may enjoy an equal share of civil liberty, and equal protection of law, and an equal security for his person and property. You enjoyed, in common with your fellow-citizens, all those rights.

If experience should prove that the Constitution is defective, it provides a mode to change or amend it, without any danger to public order or any injury to social rights.

If Congress, from inattention, error in judgment, or want of information, should pass any law in violation of the Constitution, or burdensome or oppressive to the people, a peaceable, safe and ample remedy is provided by the Constitution. The people themselves have established the mode by which such grievances are to be redressed; and no other mode can be adopted without a violation of the Constitution and of the laws. If Congress should pass a law contrary to the Constitution, such law would be void, and the courts of the United States possess complete authority, and are the only tribunal to decide whether any law is contrary to the Constitution. If

Congress should pass burdensome or oppressive laws, the remedy is with their constituents, from whom they derive their existence and authority. If any law is made repugnant to the voice of a majority of their constituents, it is in their power to make choice of persons to repeal it; but until it is repealed, it is the duty of every citizen to submit to it, and to give up his private sentiments to the public will. If a law which is burdensome, or even oppressive in its nature or execution, is to be opposed by force; and obedience cannot be compelled, there must soon be an end to all government in this country. It cannot be credited by dispassionate men, of any information, that Congress will intentionally make laws in violation of the Constitution, contrary to their sacred trust and solemn obligation to support it. None can believe that Congress will wilfully or intentionally impose unreasonable and unjust burdens on their constituents, in which they must participate. The most ignorant man must know, that Congress can make no law that will not affect them equally, in every respect, with their constituents. Every law that is detrimental to their constituents must prove hurtful to themselves. From these considerations, every one may see, that Congress can have no interest in oppressing their fellow-citizens.

It is almost incredible, that a people living under the best and mildest government in the whole world, should not only be dissatisfied and discontented, but should break out into open resistance and opposition to its laws.

The insurrection in 1794, in the four western counties of this State (particularly in Washington), to oppose the execution of the laws of the United States, which laid duties on stills, and spirits distilled, within the United States, is still fresh in memory. It originated from prejudices and misrepresentations industriously disseminated and diffused against those laws. Either persons disaffected to our government, or wishing to aggrandize themselves, deceived and misled the ignorant and uninformed class of the people. The opposition commenced in meetings of the people, with threats against the officers, which ripened into acts of outrage against

them, and were extended to private citizens. Committees were formed to systematize and inflame the spirit of opposition. Violence succeeded to violence, and the collector of Fayette county was compelled to surrender his commission and official books; the dwelling house of the inspector (in the vicinity of Pittsburgh) was attacked and burnt; and the marshal was seized, and obtained his liberty on a promise to serve no other process on the west side of the Alleghany mountain. To compel submission to the laws, the government were obliged to march an army against the insurgents, and the expense was above one million one hundred thousand dollars. Of the whole number of insurgents (many hundreds) only a few were brought to trial; and of them only two were sentenced to die (Vigol and Mitchell), and they were pardoned by the late President. Although the insurgents made no resistance to the army sent against them, yet not a few of our troops lost their lives, in consequence of their great fatigue, and exposure to the severity of the season.

This great and remarkable clemency of the government had no effect upon you, and the deluded people in your neighborhood. The rise, progress and termination of the late insurrection bear a strong and striking analogy to the former; and it may be remembered that it has cost the United States 80,000 dollars. It cannot escape observation, that the ignorant and uninformed are taught to complain of taxes, which are necessary for the support of government, and yet they permit themselves to be seduced into insurrections which have so enormously increased the public burdens, of which their contributions can scarcely be calculated.

When citizens combine and assemble with intent to prevent by threats, intimidation and violence, the execution of the laws, and they actually carry such traitorous designs into execution, they reduce the government to the alternative of prostrating the laws before the insurgents, or of taking necessary measures to compel submission. No government can hesitate. The expense, and all the consequences, therefore, are not imputable to the government, but to the insurgents. The mildness and lenity of our government are as striking

on the late as on the former insurrection. Of nearly one hundred and thirty persons who might have been put on their trial for treason, only five have been prosecuted and tried for that crime.

In the late insurrection, you, John Fries, bore a conspicuous and leading part. If you had reflected, you would have seen that your attempt was as weak as it was wicked. It was the height of folly in you to suppose that the great body of our citizens, blessed in the enjoyment of a free republican government of their own choice, and of all rights civil and religious; secure in their persons and property; and conscious that the laws are the only security for their preservation from violence, would not rise up as one man to oppose and crush so ill-founded, so unprovoked an attempt to disturb the public peace and tranquility. If you could see in a proper light your own folly and wickedness, you ought now to bless God that your insurrection was so happily and speedily quelled by the vigilance and energy of our government, aided by the patriotism and activity of your fellow-citizens, who left their homes and business and embodied themselves in the support of its laws.

The annual, necessary expenditures for the support of any extensive government like ours must be great; and the sum required can only be obtained by taxes, or loans. In all countries the levying taxes is unpopular, and a subject of complaint. It appears to me that there was not the least pretense of complaint against, much less of opposition and violence to, the law for levying taxes on dwelling houses; and it becomes you to reflect that the time you chose to rise up in arms to oppose the laws of your country, was when it stood in a very critical situation with regard to France, and on the eve of a rupture with that country.

I cannot omit to remind you of another matter, worthy of your consideration. If the marshal, or any of the posse, or any of the four friends of government who were with him, had been killed by you, or any of your deluded followers, the crime of murder would have been added to the crime of treason.

In your serious hours of reflection, you ought to consider the consequences that would have flowed from the insurrection, which you incited, encouraged and promoted in the character of a captain of militia, whose incumbent duty it is to stand ready (whenever required), to assist and defend the government and its laws, if it had not been immediately quelled. Violence, oppression and rapine, destruction, waste and murder, always attend the progress of insurrection and rebellion; the arm of the father would have been raised against the son; that of the son against the father; a brother's hand would have been stained with brother's blood; the sacred bands of friendship would have been broken, and all the ties of natural affection would have been dissolved.

The end of all punishment is example; and the enormity of your crime requires that a severe example should be made to deter others from the commission of like crimes in future. You have forfeited your life to justice. Let me, therefore, earnestly recommend to you most seriously to consider your situation—to take a review of your past life, and to employ the very little time you are to continue in this world in endeavors to make your peace with that God whose mercy is equal to his justice. I suppose that you are a Christian; and as such I address you. Be assured, my guilty and unhappy fellow-citizen, that without serious repentance of all your sins, you cannot expect happiness in the world to come; and to your repentance you must add faith and hope in the merits and mediation of Jesus Christ. These are the only terms on which pardon and forgiveness are promised to those who profess the Christian religion. Let me, therefore, again entreat you to apply every moment you have left in contrition, sorrow and repentance. Your day of life is almost spent; and the night of death fast approaches. Look up to the Father of mercies, and God of comfort. You have a great and immense work to perform, and but little time in which you must finish it. There is no repentance in the grave, for after death comes judgment; and as you die, so you must be judged. By repentance and faith, you are the object of God's mercy; but if you will not repent, and have faith and dependence

upon the merits of the death of Christ, but die a hardened and impenitent sinner, you will be the object of God's justice and vengeance. If you will sincerely repent and believe, God has pronounced his forgiveness; and there is no crime too great for his mercy and pardon.

Although you must be strictly confined for the very short remainder of your life, yet the mild government and laws which you have endeavored to destroy, permit you (if you please) to converse and commune with ministers of the gospel; to whose pious care and consolation, in fervent prayers and devotion, I most cordially recommend you.

What remains for me is a very painful, but a very necessary part of my duty. It is to pronounce that judgment, which the law has appointed for crimes of this magnitude. The judgment of the law is, and this Court doth award "that you be hanged by the neck until dead;" and I pray God Almighty to be merciful to your soul!

From the Philadelphia prison John Fries sent the following petition to the President of the United States:

The petition of John Fries respectfully sheweth: That your prisoner is one of those deluded and unfortunate men, who at the circuit court of this district, have been convicted of treason against the United States, for which offense he is now under sentence of death. In this awful situation, impressed with a just sense of the crime which he has committed, and with the sincerity of a penitent offender, he entreats mercy and pardon from him on whose determination rests the fate of an unfortunate man. He solicits the interference of the President to save him from an ignominious death, and to rescue a large and hitherto happy family, from future misery and ruin. If the prayer of his petition should be granted, he will show by a future course of good conduct, his gratitude to his offended country, by a steady and active support of that excellent constitution and laws which it has been his misfortune to violate and oppose.

His plea was successful, for President Adams issued him a free pardon. Fries afterwards opened a tin-ware store in Philadelphia, where, profiting by the custom his notoriety drew to him, he acquired a respectable fortune, and a respectable character. See *Sawyer's Life of Randolph*, 19.

# THE TRIAL OF CONRAD MARKS FOR TREASON, PHILADELPHIA, PENNSYLVANIA, 1800.

## THE NARRATIVE.

As stated in the preceding Narrative (*ante*, p. 1), the counties were scoured in search of every man who had resisted the assessors or had joined in the rescue at Bethlehem and a host of countrymen were arrested and landed in jail. Most of them pleaded guilty and not being leaders in the rebellion were given mild sentences (*post*, p. 196). But Conrad Marks, whose connection with the outbreak was brought out in the Fries trial, was indicted for treason and acquitted by the jury to the great disgust of Judge Chase. He then pleaded guilty to conspiracy, obstruction of process and rescue and was sentenced to fine and imprisonment.

## THE TRIAL.<sup>1</sup>

*In the Circuit Court of the United States, District of Pennsylvania, Philadelphia, April, 1800.*

HON. SAMUEL CHASE,<sup>2</sup>  
HON. RICHARD PETERS,<sup>3</sup> } Judges.

*April 26.*

The prisoner, *Conrad Marks*, was arraigned on an indictment for treason (see the Trial of Fries, *ante*). He pleaded *not guilty*.

*Mr. Rawle*<sup>4</sup> and *Mr. Ingersoll*<sup>5</sup> for the United States. *Mr. Ross*<sup>6</sup> and *Mr. Hopkinson*<sup>7</sup> for the Prisoner.

<sup>1</sup> *Bibliography.* See *ante*, p. 4.

<sup>2</sup> See 10 Am. St. Tr. 778.

<sup>3</sup> See 4 Am. St. Tr., 616.

<sup>4</sup> See 4 Am. St. Tr., 624.

<sup>5</sup> See 4 Am. St. Tr., 625.

<sup>6</sup> ROSS, JAMES. (1762-1847.) Born York County, Pa. United States Senator, 1793-1803. Died Allegheny City, Pa.

<sup>7</sup> See 7 Am. St. Tr., 678.



The following persons were admitted and sworn on the jury: Richard Downing, Thomas Morris, Jacob Grim, Eli Canby, Richard Roberts, Francis Gardner, John Jacobs, Benjamin Morris, Anthony Oberly, John Longstreith, William Davis, Llewellyn Davis.

The cause was opened by *Mr. Rawle*, who stated the nature of the offense of which the prisoner stood indicted.

#### THE EVIDENCE.

The conduct of the prisoner in the matters causing the indictment may be seen in the evidence given in the first trial of John Fries. See the evidence of William Thomas, p. 29; George Mitchell, p. 31; James Chapman, p. 32; Cephas Childs, p. 35.

*Mr. Ross* and *Mr. Hopkinson* (who were assigned by the court for the prisoner), very ably and ingeniously defended his cause at some length; and were fully answered by *Mr. Ingersoll* on the part of the prosecution.

JUDGE CHASE, in an elegant, learned and feeling charge, addressed the jury, informing them of the law, and reciting the facts as they appeared in evidence.

The *Jury* retired about twenty minutes past 11 o'clock at night.

JUDGE CHASE informed the jury, previous to their retiring, that the court would wait till twelve o'clock, to see if they could agree on their verdict; and that they must return to court and inform whether they could agree or not. At that hour the jury returned and informed the court that they could not agree. The JUDGE ordered that the jury be kept together in some convenient place till Monday morning at ten o'clock, to which time the court adjourned.

*April 28.*

Today the *Jury* returned a verdict of *not guilty*.

An indictment was afterwards filed against the prisoner for conspiracy, obstruction of process, rescue and unlawful combination, on which he submitted to the discretion of the court.

JUDGE CHASE passed the following sentence:

That he be imprisoned two years, and fined 800 dollars, at the expiration of which, to give security for his good behavior, himself

in 2000 dollars, and two sureties in 1000 dollars each, and to stand committed till the sentence is complied with.

Before the sentence *Mr. Ross* addressed a few words to the court in his behalf. He observed, that though his client had offended against the laws of his country, yet he had been deceived into his opposition. It had been said, from what he thought undoubted authority, that no such law was in existence. As this was the case, and as his circumstances were low, he hoped the court would consider his situation.

JUDGE CHASE said he was a most atrocious offender; he had not the least doubt but he was guilty of treason in a high degree, and that the verdict ought to have been found, and he have been made an example of. There must have been some mistake as to evidence, or the jury could not have returned a verdict of not guilty.

THE TRIAL OF HENRY SHIFFERT, CHRIST-  
IAN RUTH, HENRY STAHLER, DANIEL  
SCHWARTZ, SR., DANIEL SCHWARTZ,  
JR., AND GEORGE SHAEFFER FOR  
CONSPIRACY, PHILADELPHIA,  
PENNSYLVANIA, 1800.

THE NARRATIVE.

Among the prisoners who refused to plead guilty to indictments for conspiracy, obstruction of process and rescue were the above six. Shiffert, it was proved, was at Bethlehem armed, and so was Ruth, but they took no active part in the rescue. Stahler also was there, but only, according to one witness, to see what was going on. The Schwartzes, father and son, were both at Bethlehem; the father was present at one of the meetings of the conspirators, but the son was more active; he threatened to beat one of the assessors and tore the cockade from the hat of another. But for some reason hard to understand, he, Daniel, Jr., was acquitted by the jury while the other four were found guilty.

THE TRIAL.<sup>1</sup>

*In the Circuit Court of the United States, District of Pennsylvania, Philadelphia, May, 1800.*

HON. JAMES IREDELL,<sup>2</sup>  
HON. RICHARD PETERS,<sup>3</sup> } *Judges.*

*May 10.*

The prisoners, Henry Shiffert, Christian Ruth, Henry Stahler, Daniel Schwartz, senior, Daniel Schwartz, junior, and George Shaeffer were arraigned on an indictment for an un-

<sup>1</sup> *Bibliography.* See *ante*, p. 4.

<sup>2</sup> See 4 Am. St. Tr., 616.

<sup>3</sup> See 4 Am. St. Tr., 616.

lawful conspiracy in the counties of Northampton and Bucks, to impede the operation of the act laying a tax on houses and land by opposing the assessors in the execution of their duty; for obstructing William Nichols, Esq., the marshal, in the execution of process, and for assisting in the rescue of several persons held in custody by the said marshal. They pleaded *not guilty*. A jury was duly impanelled.

*Mr. Rawle*<sup>4</sup> for the United States. *Mr. McKean*<sup>5</sup> for the prisoners generally, and *Mr. Dallas*<sup>6</sup> more particularly for George Shaeffer.

#### THE EVIDENCE.

*Colonel Nichols*, the marshal, related the circumstances which occurred at Millar's town as it respected the rescue of Shankwyler and the absence of Shaeffer, who hearing that a bill of indictment was found against him, came to the city to deliver himself up.

*Samuel Toon*. Belonged to Capt. Jarrett's Company, F, Light Horse. On 7th of March went to the home of Daniel Schwartz because I heard that the light horse were to meet there; when I came there was one of the light horse there named Samuel, the son of Daniel Schwartz; asked him who ordered the company together, and what they were about to do; he said that John Fogle, the lieutenant, had directed them to meet at Guise's tavern, about 3 miles from Bethlehem; he then asked me if I would go along. I answered, no. Daniel Schwartz had another son named Daniel, who wanted to go

along, but the old man would not allow it, because he had no regimentals or uniform. I would not lend my cap, because I told him I might want it myself, if I could get a horse, as I told him I had it in my heart to go. If that is all your excuse for not going, old Schwartz said he would lend me his horse, and give me a dollar in the bargain; young Daniel he would not allow to go along, but he begging very hard, he would allow him to go as hostler, to take care of the horses. They went, some of them as far as Guise's tavern, some of them were in regimentals, and some not. I and Schwartz's two sons went, and when we came to Guise's there was no officers. Six went from Schwartz's house. Henry Staeler, myself, Adam Stahlaker and Schwartz's three sons. When we came within half a mile of Guise's, we overtook a company of riflemen. They had no officer. I determined to go no

<sup>4</sup> See 4 Am. St. Tr., 624.

<sup>5</sup> MCKEAN, JOSEPH BORDEN. (1764-1826.) Attorney General, Pennsylvania, 1800-1808; Associate Justice, District of Pennsylvania, 1808-1826. Died in Philadelphia.

<sup>6</sup> 7 Am. St. Tr., 679.

farther; there began a quarrel among them, some of them were willing to go, and some of them were not. I would not go a step farther unless there was some officer who would take the command and answer for it. They agreed and chose Andrew Schiffert. He then said he would accept. They then went on to Bethlehem. About half a mile on this side of the bridge we were met by four persons from Bethlehem. These four men persuaded us to go back again; there was some that was willing to go back, among whom was Schiffert, the captain; as they would not follow him, he laid down his commission again. They then went all in confusion, till we came to the bridge, all mixed one with another. There came one and told them that the two riflemen were prisoners, which irritated them very much, and they said they would go and get them; they would have them. The gentlemen told them they would bring themselves into great trouble. They then proceeded and chose some people to go with them to the marshal, to see whether he would give up these two men, and then they would return to their homes. They then requested me to go over as one. I agreed provided they would remain there till we returned. When I came to the tavern Mr. Mohollan and the others took us in to the marshal; but the greatest part of our company had come in, and therefore I could not tell what to say for them in their behalf. The marshal, he asked what was their design; I answered I did not know. The marshal did not deliver up these two men.

*Cross-examined.* There came

some horsemen, some armed, and some unarmed, and they hurried into the yard. When I saw them standing in a rank I went down stairs, and asked Captain Stahler how he came over when he promised not to come over. His answer was, that the Bucks county people had come, and they all come over together. Heard some of them say that they wanted the prisoners out, and that they would force themselves into the house; came out of the house several times to pacify them, and so did Shankwyler come out twice to speak to them.

*Andrew Shiffert.* Related the same facts in substance as before (see *ante*, p. 28). He saw Christian Ruth going to Bethlehem, and while he was present heard some person say they would take the prisoners from the marshal.

*William Barnett and Christian Ruth's* testimony related to the conduct of the elder Schwartz at Bethlehem (*ante*, pp. 17, 19).

*William Henry* related the affairs generally as before respecting the conduct of Stahler and Shiffert (*ante*, p. 16); also of old Schwartz, who appeared to pride himself in having two fine boys at Bethlehem.

*John Fogle.* A lieutenant in Jarrett's troop related some of the circumstances previous to the march to Bethlehem. Shiffert at Millars town advised him to go to Bethlehem; and that if they would not take bail for Shankwyler, they would not let them go to Philadelphia.

*John Moretz.* Saw Stahler with others who said that they would go to Bethlehem to see what they were going to do with

the prisoners—they did not say they would release the prisoners; did not know them any way active in breeding discontents. At a meeting to read the law, one, he believed George Shaeffer said it was no law, and if it was, they would not submit to it. He talked very loud, and appeared much dissatisfied.

*Jacob Eyerly.* Went through his former evidence of the meeting at Schymer's (*ante*, p. 25), and related the general state of discontents through that part, and the prostrate state of the laws: many objected to suffer the execution of the house law, because it was not signed by Mr. Jefferson as Vice-President (he being absent at its passing)—Old Schwartz told witness that two of his sons were there at Bethlehem, and that he had persuaded Toon to go, promising him a dollar, and lending him an horse, advising him to take his trumpet that they might make a good appearance: Daniel Schwartz, Jr., tore off Mr. Balliott's cockade at Miller's town, and they were both very abusive.

*Christian Hickavelter.* Was an assessor in Upper Milford; great difficulties attended the execution of his duty. Did not know any thing more of the defendants than what was related by Mr. Eyerly of George Shaeffer; the elder Schwartz was a very quiet good neighbor.

*Judge Peters.* An examination of Schwartz, Sr., taken before me, acknowledged that he had persuaded Toon to go to Bethlehem, and that he was there himself, but that he did nothing, nor said any thing about the rescue; but that he went merely out of curiosity.

*Jacob Sernher.* He was told by George Shaeffer to tell Judge Henry to inform the assessors not to come into Millar's town to assess the houses; for that there was a man in town who was provided with a sword and pistols, and that he would not suffer the houses to be assessed. He did not mention to the witness who the man was.

*Daniel Reisch.* George Shaeffer told me that he would not suffer his house to be measured, and he was a damned stamplere if he suffered them to measure his: That if the assessor came into their town, he should not come out again with his life: that they had bound themselves together to oppose the execution of the law; and if he, the defendant, was to be put to prison, there would be fifty men unite to take him out.

*John Schymer.* Related the circumstance of the meeting at his house, as deposed by Mr. Eyerly. Shaeffer was very violent.

*Mr. M'Kean* went through a variety of authorities to prove, that no conspiracy was formed, because no compact whatever was entered into by the parties to support each other, each individual acting and speaking, so far as they went, separately. He read 1 Hawk 346, chap. 72, and the Sedition Act, sec. 1. As to the rescue, he said, it did not appear that the

defendants were engaged, for a rescue could not be accomplished without force, but no force whatever had been proved upon them. 4 Blackstone, 131, and 345; 2 Hawk. c. 21, secs. 1-3; Pierre Williams, 484; 6 Comments, 230, and 2 Hawk. c. 19, sec. 5, were the authorities he read. As to the opposition to the law, it appeared that they had doubts, which, in their uncultivated state, and extreme want of knowledge, were well grounded, that the law was in existence. He then concluded with a review of the part which the defendants were severally said to have taken in the transaction.

*Mr. Dallas* went into a lengthy defense of *George Shaeffer*, after which *Mr. Rawle* went into a definition of the different counts in the indictment of conspiracy, unlawful combination, rescue and obstruction of process, applying the evidence so as to bring the charges home on the several defendants. That they all had been guilty of conspiracy he thought incontrovertible; because when a conspiracy was formed, all who were ever present, as well as those more actively engaged in it were guilty, though some might be superiors and some subordinate. All the defendants were assembled, and therefore partook of the crime. Five of them were seen at Bethlehem. *Andrew Shiffert* saw *Ruth* going to Bethlehem, and *Toon* saw him at Bethlehem in company with the disturbers of the public peace. *Old Schwartz* was at Bethlehem, and was engaged in counselling and advising an unlawful assembling there, which was calculated to defeat the act. *Young Schwartz* was at Bethlehem, and also was engaged in the insult upon *Mr. Balliott* to tear off his cockade. *George Shaeffer* was at Bethlehem; but, though not in arms, though not guilty of the rescue, was frequently engaged in opposition to the law, in conspiracy against it, and in obstruction of process, on which account he may be ranked among the most guilty. On the whole, he considered that each of them partook of the crimes charged in the indictment.

#### THE JUDGE'S CHARGE.

JUDGE IREDELL observed that there were three counts in the indictment. First. Conspiracy to prevent the execution of the

law. To raise a conspiracy, several must be engaged, but it must be observed that every one engaged, or joined therewith, was guilty of the conspiracy. It was not necessary, under this indictment, as under that lately before the court for treason, that two witnesses should substantiate any one fact, one would do; nor was it necessary that any writing or agreement should be drawn between the parties to create it a conspiracy. A meeting was held, the object of which was but too well authenticated by previous conduct.

The second count concerned the rescue of the prisoners. It had been stated that actual force must be used to make it a rescue. The learned JUDGE said that if the object was obtained by intimidation, and the prisoners were surrendered, it did not differ from force in the least, in a legal view, for if a highwayman was to put a pistol to the breast of another, and demand his money, as had been stated by Judge Peters in the case, 2 Hawk 37, and the money was delivered, it was a robbery, though the pistol had not been fired. The question was, were not the threatenings held out to the marshal the immediate cause of his surrendering the prisoners in order to prevent lives being lost? With regard to the arrest, no doubt could be entertained that the Lehigh prisoners, as well as Ireman and Fox, were completely in the marshal's custody. There are only two kinds of escape, one is voluntary, and the other is negligent. The former is where the officer is agreeable to the escape, the latter, as in the case before the jury, is, the officer not having power to keep them, suffers them to go at large.

The third count respects obstruction of process. The JUDGE said he did not think it right to convict either of the defendants of the whole three counts, because the rescue necessarily implied obstructions of process, no man could be guilty of a rescue without obstruction of process, and therefore the counts resolved themselves into two; if it was the opinion of the jury that either of them were guilty of the whole, the verdict need only be given on the two first, to-wit: Conspiracy and obstruction of process. As to the conspiracy, it cannot be possibly doubted but there was one.



The JUDGE then took up the individual conduct of the several defendants, after the following order. First:

Daniel Schwartz, Sr., by the evidence of the marshal and of William Barnet, he was seen at Bethlehem, but he behaved civilly, and was come there to know what they were doing. Christian Ruth saw him there. Judge Henry deposes that he appeared to pride himself in his two fine boys who were there. Mr. Eyerly did not know that he was active there, but he appeared quite jovial. He said he had two sons there; that he requested Tom to go there, and advised him to take his trumpet to look well. It was given in evidence, when told of his son pulling Mr. Balliott's cockade from his hat; that if he had seen his son do it, he would have whipped him, and he appeared to be sorry so much insult was given to the marshal at Millar's town. Mr. Schymer says he was at the meeting at his house, but cannot say he misbehaved.

Daniel Schwartz, Jr. The marshal thinks he saw him at Millar's town, where he seemed to be a pretty active and busy young man. Toon saw him at Bethlehem, but without uniform, and cannot say he misbehaved, or interfered. Mr. Eyerly saw him at Millar's town behaving very abusive, and threatening to beat them, and he thinks it was him who tore the cockade from Mr. Balliott's hat.

Henry Shiffert. The marshal saw him at Bethlehem, and he believes he was armed. Toon saw him there, and with a sword, which he drew. Fogle saw him at Millar's town, when he said, that if they would not take bail for Shankwyler, they would not let him go to Philadelphia.

Henry Stahler, the marshal also thinks he saw at Bethlehem. Andrew Shiffert saw him, both there and on the road, in uniform. Moretz saw him on the road, and he said he was going to see what was become of those prisoners. He was in uniform, with a sword. Toon says that Stahler said he would not interfere in the rescue.

Christian Ruth was seen at Bethlehem by Toon, in uniform, with a sword. Andrew Shiffert saw him there and on the road. Some persons in his presence said, that they would take the prisoners from the marshal.

George Shaeffer was seen at Bethlehem by Shiffert, but without arms or uniform. William Barnett saw him there; he said he was come there only to see some of his neighbors going to Philadelphia; he said if the marshal wanted to take him, he would give himself up: he did not appear to be one of the rioters. Judge Henry saw him at Bethlehem; he did not appear to be violent, or use any offensive language; he saw him much out of doors with the company, but not active. John Moretz saw him at the meeting at Schyer's, where he talked very loud, as though wished to prevent Mr. Eyerly reading the law; and on some of them doubting whether it was a law or not, he said, even if it was, they would not submit to it. Mr. Eyerly and Mr. Schymer deposed the same, and that, he added "here I am, take me to gaol, but you shall see how far you will bring me;" on which a number adds, "Yet, let them but take one to gaol, we will soon have him out again." Mr. Heckawelter says, that he told him he had abused his father something about a liberty pole, and that he was come to give him a licking for it, for which he followed him. Mr. Sterner says, he told him to tell Judge Henry about the man with sword and pistol, who would oppose the assessors. Mr. Reisch deposed, that the defendant said he was a damned stamplero, if he suffered his house to be measured; he would not: that if the assessor came into his township, he would not come out again alive; and if they were to take him to prison, there would be fifty men to take him out again. Mr. Schymer said, that the defendant was very much against choosing assessors, and was pretty violent; that he abused Mr. Heckawelter about the liberty pole.

The JUDGE said, he should forbear speaking particularly as to the nature of the combination or conspiracy; but, if it was not predetermined, after meeting together there, the very act of meeting became a conspiracy; if the defendants came there after it began, not having a previous knowledge of it, it was their duty to have withdrawn themselves; but if they did engage themselves voluntarily and knowingly, though they knew nothing of it before, it was deemed in law equally as much a combination as though they had predetermined it.

## THE VERDICT AND SENTENCES.

The *Jury* withdrew, and next morning returned with the following verdict:

Christian Ruth, Henry Stahler, and Henry Shiffert, guilty, as to the rescue.

Daniel Schwartz, Sr., guilty of the conspiracy, in advising an unlawful combination.

George Shaeffer, guilty of the conspiracy, in advising, and guilty as to the rescue.

Daniel Schwartz, Jr., not guilty.

JUDGE IREDELL. George Shaeffer, Henry Stahler, Henry Shiffert, Christian Ruth, and Daniel Schwartz, though the crimes of which you have been convicted, in some respects, are different in their nature, yet they all have reference to one common object, that of defeating, by force of arms, the execution of an Act of the Congress of the United States. You and your confederates succeeded so far, as totally to prevent, in one mode or other, the execution of that act, in a very important part of this State. The act thus daringly opposed, which was for the collection of a tax on lands and houses, was framed with particular anxiety for the relief of the poorer part of the community, and the burden of it must fall principally on the rich. The ignorance of it which was affected was without the least color of excuse, because information was offered, which was repeatedly rejected, and in some instances with tumult and disdain. Neither could you fairly allege any ground for discontent, on account either of the character or conduct of the officers concerned, because the former appears to have been perfectly unexceptionable, and the latter in general meritorious in the highest degree, as they united with that firmness which their duty required, every endeavor consistent with it, to give all the information in their power, and to execute the law in the manner most convenient for the people. By your ill conduct, however, and that of your associates, a considerable part of three counties was inflamed into a state of insur-

rection: the law in question lost all its efficacy: officers were insulted—and at length that daring and infamous outrage was perpetrated at Bethlehem where a body of the militia itself marched in military array, and by force rescued a number of prisoners from the custody of the marshal, whose conduct on that occasion for courage, discretion, and propriety in every respect, is above all praise. In consequence of such defiance of the constitution and laws of your country, and the numbers and strength by which they were supported, it became the indispensable duty of the government to exert the powers with which it was invested to suppress this combination, and bring the principal perpetrators of it to a trial for the offenses they had committed. The civil magistrates having lost all their authority (notwithstanding some of them exerted themselves in an extraordinary manner, which deserves the lasting esteem and gratitude of their country), a melancholy necessity arose for employing a military force, which chiefly consisted in volunteer corps, who had nobly embodied themselves to defend the constitution, and laws of the United States, whenever any occasion should arise, though undoubtedly hoping that their services would be required, rather against the foreign enemies of their country, than any within the bosom of it. The services of these gentlemen have been attended with great benefit to their country, and great honor to themselves; but there is too much reason to fear they must have sustained much personal inconvenience, for which, as well as for other private injuries, and a great additional expense and inconvenience to the public, the authors of those outrages are alone accountable. You have each of you undergone a fair and impartial trial, and have been convicted of one or more offenses charged against you, for which it is now the duty of the court to pronounce the sentence of the law upon you. The discretion which the law has confided to us, we have endeavored to execute to the best of our judgment, considering on the one hand the necessity of making proper examples to deter others from the commission of the like offenses, which it seems to have been supposed would always pass with impunity, and on the other

hand paying a due regard to the various circumstances which appear to have discriminated the conduct of each of you.

The sentences are as follows:

That George Shaeffer, convicted upon two counts of the indictment, viz.: conspiracy and obstruction of process, pay a fine of \$400, and be imprisoned for eight months, for the first offense; for the second that he pay a fine of \$200, and be imprisoned four months, after the expiration of the first term: and at the conclusion of the twelve months' imprisonment, that he give security for his good behavior for two years, from the expiration of the period of his imprisonment, himself in the sum of \$1,000, and two sureties in the sum of \$500 each.

That Daniel Schwartz, Sr., convicted of conspiracy, pay a fine of \$400, be imprisoned for eight months, and give security at the close of that period for his good behavior for one year, himself in \$1,000, and two sureties in \$500 each.

That Christian Ruth, convicted of aiding in the rescue, pay a fine of \$200, be imprisoned for eight months, and give security for his good behavior for a year, himself in \$1,000, and two sureties in \$500 each.

That Henry Stahler, convicted of aiding in the rescue, pay a fine of \$200, be imprisoned for eight months, and give a like security with Schwartz and Ruth for his good behavior.

That Henry Shiffert, convicted also of aiding in the rescue, pay a fine of \$50, be imprisoned eight months, and give security for good behavior for twelve months, himself in \$500, and two sureties in \$250 each.

The prisoners each to pay the costs attending the prosecution before they are discharged from prison, and stand committed until the sentences be complied with.

The court, taking into consideration the circumstances of the parties, proportions the penalties accordingly.

## THE TRIAL OF JACOB EYERMAN FOR BREAK- ING PRISON AND CONSPIRACY, NORRIS- TOWN, PENNSYLVANIA, 1799.

### THE NARRATIVE.

Eyerman was a Luthern minister and was one of the prisoners rescued at Bethlehem. He was likewise one of the loudest in opposition to the tax and after his sermons used to exhort the people not to pay it, telling them that Congress had no right to pass the law and that they would lose all their liberties if they submitted to it. No one, not even Fries, did more to arouse opposition to the law; one witness on the trial testified that the resistance in his county would not have taken place or if it had would not have gone to such a length "had it not been for the parson."<sup>a</sup> He was convicted of conspiracy and breaking prison and sentenced to fine and imprisonment.

### THE TRIAL.<sup>1</sup>

*In the Circuit Court of the United States, Norristown, Pennsylvania, October, 1799.*

HON. BUSHROD WASHINGTON,<sup>2</sup>  
HON. RICHARD PETERS,<sup>3</sup> } *Judges.*

*October 16.*

*Jacob Eyerman* was arraigned on an indictment for breaking prison, conspiracy to oppose the law for laying a direct

<sup>a</sup> John Sersass, *post*, p. 191.

<sup>1</sup> *Bibliography.* See *ante*, p. 4.

<sup>2</sup> WASHINGTON, BUSHROD. (1762-1829.) Born Westmoreland County, Virginia. His father was John A. Washington, a brother of George Washington, of whom the son was a favorite nephew. Was educated in the house of Richard Henry Lee and at the College of William and Mary. Served in the army under Lafayette and studied law in Philadelphia with James Wilson, whom he succeeded on the Supreme Bench. Member of the Virginia House of

tax and a tax on houses and for counseling and advising an unlawful combination and conspiracy.

The *Prisoner* pleaded *not guilty*.

*Mr. Rawle*,<sup>4</sup> for the United States.

After the *jury* were sworn *Mr. Rawle* opened the prosecution by stating to the jury the sum of the indictment to be divided into three separate and distinct charges proceeding from the same transaction and partaking of the same guilt. First, he should prove that there was a warrant issued by the judge of the district to take the person of the prisoner into the custody of the marshal which was effected, but that he did break prison and go at large until by another warrant he was afterwards taken in the State of New York. Secondly, he should prove that the prisoner was engaged in a conspiracy to oppose the operation of two laws of the United States by intimidating the assessors while in the discharge of their official duty. Thirdly, that the prisoner did counsel and advise an unlawful combination and conspiracy to prevent those laws being carried into effect.

It was only three years and a half since he came into this country—and though he had assumed the respectable character of a minister of the gospel; though in that capacity he was bound to preach submission to the laws of the country

Delegates (1787), and of the Convention which ratified the Federal Constitution. Practiced law in Alexandria and Richmond, Va., and reported the decisions of the State Supreme Court and of the United States Circuit Court. In 1798 he became an Associate Justice of the Supreme Court of the United States, which he held until his death. "Of solid rather than brilliant mind, sagacious and searching rather than quick or eager, of temperate yet firm disposition, simple and reserved in his manner, laborious in research, clear in statement, learned in discussion, accurate in reasoning, with the love of justice as his ruling passion, fearless, dignified and enlightened, he found himself at the early age of thirty-six years called upon by President Adams to fill an office which, during a long judicial life, he adorned by labor, learning and wisdom." Carson, *Hist. Supreme Court of the U. S.*, Vol. I, p. 189. Died in Philadelphia.

<sup>3</sup> See 4 Am. St. Tr., 616.

<sup>4</sup> See 4 Am. St. Tr., 624.

yet in that short time he had recommended, both by his advice and example, an opposition to those laws by which the whole community were bound.

He then related some circumstances that occurred at Bethlehem, to which place the defendant was brought prisoner, and in the custody of the marshal, but availing himself of the opportunity there given to the prisoners to escape, instead of again delivering himself up, he immediately fled, left the country, and sequestered himself in a remote part of the State of New York, where he was discovered, and again taken into custody. This, he said, was punishable at common law, independent of the sedition law lately passed, which only went to explain the common law, and in many cases to ameliorate its rigor.

#### THE EVIDENCE.

*Col. Nichols.* Am the marshal. The prisoner was arrested and brought into my custody at Bethlehem, and he was rescued, together with the other prisoners, by an armed force on March 7th last. (The witness related the transactions attending his journey to, and at Millar's town, and at Bethlehem previous to the rescue. See Trial of Fries, *ante*, p. 1.) After the prisoners were rescued, John Fries expressed a great solicitude for the safety of Eyerman by returning, not having seen him among the others, and asking me where was the minister? Told him he was out of the house; he said he was not, however he went out again, and there seeing him, appeared perfectly satisfied. After this man was liberated, Captain Jarret said he could now march off his men. It seemed that Eyerman's deliverance was a particular object with those people. He promised when in the room that if he was rescued he would

meet me the day following at Philadelphia to deliver himself up, but he did not; never knew what become of him till he was brought back by the deputy marshal of New York.

*Jacob Eyerly.* Was commissioner for the district; the prisoner, at a meeting held in Hamilton township, told the people that Congress had no right to pass such a law, and if the assessors were to come to his house he would tell them so, and not let them proceed to take his rates.

*John Sersass.* Resided in Northampton County; was assessor under the law for laying a direct tax; the people were much uproared against it and were to assemble to consider the law; resolved to tell the people they were doing wrong, and there were 40 or 50 people assembled; but not in a military dress. The prisoner came in, began to rip out in a violent manner against this taxation, saying, that Con-



gress had made laws which were unjust, and the people need not take up with them, if they did all kinds of laws would follow, but if they would not put up with this, they need not with those that would come after, because it was a free country; but in case the people admitted of those laws, they certainly would be put under great burdens. He said he knew perfectly well what laws were made, and that the President nor Congress had no right to make them. The people thought that the minister was right, but I told them that he was leading them wrong; asked them whether they had heard or seen the laws? They said no. Told them the words, but found very little heed taken of it. Mr. Eyerman said, that the people should not let the assessors take down their taxation, and that they might abuse them ever so much, there was no law could hurt them for doing it.

Later I explained the law to them and they appeared very peaceable.

The second day of Christmas this man preached at a private house; as soon as sermon was done, he went to the house of Conrad Crazy, but he no sooner came in, than he began to run out against the taxation very much. There were about fifteen present. He repeated then that he knew the laws very well, and that Congress and the government only made such laws to rob the people, and that they were nothing but a parcel of damned rogues, and thieves, but that they (the people) had no right to submit to it. I told him that I had told him before to quit doing that, that it was not his duty;

that his duty was to preach his sermon, and to quiet the people, or decide between them: if he went on that way I should bring him to such damage as he would not like. With that he did quit. He told me often that it was better for me not to take up with that commission, perhaps it might injure me, for I might meet with some evil. The people of our township much opposed the law. They were so violent that I knew but one man that was the same side as myself. Such proceedings would not have taken place, or, if they had, it would not have arisen to such an height, if it had not been for the parson; knew of no other person there who went about to advise the people to opposition. He said he had a book of the laws, and either that there was no such law in it, or else that the constitution forbade such laws. Eyerman did not appear to be a simple sort of a man, easily to be led astray, or deluded; he was always thought a very good preacher.

The *Prisoner*. Did I not tell you at Crazy's house that I did not think any the worse of you for being an assessor, because you were sworn to support the government, and had a right to speak for it? At that house, when I spoke against his conduct, he said "aye, Mr. Sersass is right, he is sworn to support the government." Did I not pray for the government, President and Vice-President? Yes, you did when in the pulpit, but when you were out you prayed the other way.

*John Sneider*. Live in Hamilton township; knew the prisoner; he told me that a body

should lay out against that house tax; the prisoner meant, to take arms against it. He said that if we let that go forward, it would go on as in the old country, but that he (the prisoner) would rather lay his black coat on a nail, and fight the whole week, and preach for them Sundays, than it should be so. The township was always peaceable I suppose before he came among us. I believe if he had not come, nothing would have happened of the kind.

*Simon Haller.* Resided in Hamilton township, knew the prisoner, who was very well liked as a preacher until lately. He was in opposition to the house tax law. He came to my

house, where he said he did not care whether they put up with it or not, for he had no house to tax. A person present answered, but you have a great quantity of books to tax. The prisoner answered that "if any body would offer to tax his books he would take a French, a Latin, an Hebrew, and a Greek book down to them, and if they could not read them, he would slap them about their ears till they would fall to pieces." Saw the prisoner at Hartman's when he talked much against the tax. The occasion of the people coming together then, was, that there was preaching that day. Prisoner continued preacher to that congregation till he was taken up.

*Judge Peters.* I issued a warrant to apprehend prisoner, but never saw him until brought from New York. The general state of the country was such

that, knowing the county magistrates could not execute their duty, I was obliged to issue his warrants as judge of the district.

The *Prisoner*, his pecuniary circumstances not enabling him to employ any counsel, refused to make any defense, but observed that if he had been guilty of any thing, it was contrary to his knowledge, and he hoped, if the jury should find him guilty, that they, and the court would take his case into consideration, and punish him as slight as possible, and he would endeavor in the future course of his life to do better.

*Mr. Rawle* in a short address to the jury quoted 2 Hawkins, p. 243, to show that the prisoner was in lawful custody, and page 245 what was the force which in law made breach of prison, page 249 stated that whoever broke from lawful confinement was guilty of misprison, which was punishable by fine and imprisonment. The act commonly called the sedition act, he said, spoke of the second and third counts in the indictment (conspiracy and counselling and conspiracy). Respecting the crime of conspiracy he quoted 2 Hawkins,

p. 119, which refers to Blackstone, p. 392. He referred the jury to the testimony, to prove what part the prisoner had taken in either, or all the crimes alleged.

#### THE JUDGE'S CHARGE.

JUDGE WASHINGTON. Gentlemen of the Jury: It cannot be necessary that the court should detain you long in the charge on the present occasion. The crimes with which the prisoner before you is charged are, first, a combination with others, for the purpose of opposing the government. secondly, advising and exciting others to this opposition; and thirdly, in rescuing himself from the hands of the marshal, in whose lawful custody he was.

Opposition to government seldom breaks out into overt acts, unless some previous combinations have been made by persons who think themselves strong enough to do it with effect; and this seldom happens, until some person or persons, more knowing, and more wicked than the general mass of society, endeavors to advise and mislead the ignorant and unwary, or less designing. Thus to form a powerful combination, there must be a regular chain for that precise purpose.

The offense or offenses with which the prisoner is charged is inferior to overt acts, and the punishment is less. The only question for you to determine is whether, upon evidence, the prisoner has been guilty of all or either, of the offenses laid to his charge. It would be tedious and, I think, unnecessary for me to go through the testimony, because it must be fresh in your minds. Respecting a combination to oppose an act of Congress, the general circumstances for your inquiry are such as will satisfy you of the existence of such a combination. This, I think, is proved by the frequent meetings of the people in the different townships of the counties of Northampton, Bucks, and Montgomery, the declarations of the people when convened, and the threats so frequently thrown out by them against the government, and the officers of government. Attempts were frequently made, not only by the prisoner, but by others to disunite

the people, and to deter the public officers from executing the duty reposed in them, and which they were sworn to perform, by pointing out to them the dangers to which they were exposed, should they carry those laws into execution. Unless you discredit the testimony which has been laid before you, and that there is no cause for doing, it appears to the court that the proof is as clear against him as anything can possibly be.

That he was the prime cause and adviser of this opposition appears to be proved by many witnesses, the respectability of whom has not been pretended to be doubted.

Respecting the rescue, the attorney of the district has precisely laid down the law to you. It does not follow, because a man escapes from prison, or from the custody of an officer (which is the same in law) that therefore he is an offender within the law for which he was committed: nor does it follow that he did not break prison, because the act of force was executed by others who were in combination with him, and he in consequence thereof made his escape. He consented, and showed that consent, by his escape, for whether the force was used by himself or others, is immaterial.

From all the testimony, it appears that the prisoner, in his previous conduct took pains to stir up the discontents, and that the armed force came to Bethlehem to rescue him, by their earnestness to set this man, particularly, at liberty. Farther, his subsequent conduct proves his offense, for if he had not been liberated by his own consent, he would have done as the others did, who left the custody of the marshal at the same time: he would have given himself up afterwards; but on the contrary, he fled from his country, and secreted himself, until taken by a new warrant in another district.

Gentlemen, it is your business to bring these facts into one view, and decide whether the prisoner is guilty of one, two, or all of the counts in the indictment: as you think, so you are bound to find.

## THE VERDICT AND SENTENCE.

In about fifteen minutes the *Jury* returned with a verdict of *guilty* on all the three counts.

*Eyerman*, at the next term submitted himself to the court, when he was sentenced to be imprisoned one year, to pay a fine of fifty dollars, and then to give security for his good behavior one year, himself in \$1000, and two sureties in \$500 each.

*May 2.*

The following persons, who submitted themselves to the discretion of the court, and respecting whose crimes and circumstances some examination took place, received the sentences severally annexed to their names, for conspiracy, rescue and unlawful assembly:

Henry Jarret \$1,000, 2 years imprisonment; Conrad Marks \$800, 2 years imprisonment; Valentine Kuder \$200, 2 years imprisonment; Jacob Eyerman \$50, 1 year imprisonment; Henry Shankwyler \$150, 1 year imprisonment; Michael Smyer \$400, 9 months imprisonment; Henry Smith \$200, 8 months imprisonment; Philip Desch \$150, 8 months imprisonment; Jacob Kline \$150, 8 months imprisonment; Harman Hartman \$150, 6 months and 1 day imprisonment; Philip Ruth \$200, 6 months imprisonment; John Everhart \$100, 6 months imprisonment; John Huber \$150, 6 months imprisonment; Christ. Sox \$200, 6 months imprisonment; John Klein, Jr., \$100, 6 months imprisonment; Daniel Klein, Jacob Klein, Adam Brieck, G. Memberger, \$150 each, 6 months imprisonment; George Gettman, William Gettman \$100 each, 6 months imprisonment; Abraham Shantz, H. Memberger, Peter Hager \$100 each, 4 months imprisonment; Abraham Samsel, P. Huntsberger \$50 each, 3 months imprisonment; Peter Gable, Daniel Gable, Jacob Gable \$40 each, 2 months imprisonment.

Each of the above persons were required to enter into recognizance for their good behavior,

**THE TRIAL OF JUDGE SAMUEL CHASE FOR  
"HIGH CRIMES AND MISDEMEANORS,"  
WASHINGTON, D. C., 1805.**

**THE NARRATIVE.**

Samuel Chase, one of the Justices of the Supreme Court of the United States, on March, 1804, was charged by the House of Representatives with being guilty in his judicial capacity of "high crimes and misdemeanors," and Managers were chosen to impeach him before the Senate of the United States. In January, 1805, the trial began. The Senate chamber had been fitted up as a court "in imitation of the splendid hall in which Warren Hastings had been tried and acquitted." On the right and left of the Vice-President were two rows of benches covered with crimson cloth; on these the senators were to sit in judgment. Before them was a temporary semicircular gallery raised on pillars and covered, front and seats, with a green cloth. To this the women came in crowds. Under the gallery were three rows of benches rising one above another, likewise covered with green cloth and set apart for the heads of departments, foreign ministers and the members of the House of Representatives. In front of the ampitheater and facing the right and left of the Vice-President were two boxes covered with blue cloth. One was occupied by the Managers, the other by the accused and his counsel.

On the opening day the proceedings were merely formal. The Senate attended. The Secretary read the return of the summons. The name of Samuel Chase was called and the Judge was told the Senate was ready to hear his answer. His answer was short and temperate. He denied that he had committed any crime or misdemeanor whatever; denied with a few exceptions every act with which he was charged; spoke of the importance of the impeachment not only to himself but

to the cause of free government, and asked until the next session of Congress to put in his answer and secure counsel for trial. He was given a month.

On February 4th, for the first time, the Managers and the counsel for the accused appeared in their boxes. The month allotted the defendant to secure counsel and make ready for trial had been well spent, and he now confronted his accusers with an array of legal talent such as had never yet assembled in the city of Washington. Beside him stood Luther Martin, a man without an equal at the Maryland bar; Robert Goodloe Harper, Charles Lee, Philip Barton Key, and Joseph Hopkinson. As counsel for the House, were the Managers, John Randolph, George Washington Campbell, Joseph Hopper Nicholson, Caesar Augustus Rodney, Peter Early, and Christopher Clarke. The articles of impeachment were eight in number. The first set forth his arbitrary, oppressive and unjust treatment of Fries on his Trial for treason (see *ante*, p. 146). The next five charged him with having oppressed James Thompson Callender on his trial for libel (see 10 Am. St. Tr. 813), by forcing a prejudiced juror to serve, by ruling out evidence, by acting so partially and intemperately, that the counsel had been compelled to abandon their client and their case; in violating the laws of Virginia by issuing a *capias* against the body of Callender instead of a summons, and by trying the prisoner at the same term at which he was indicted, though the law declared that he should not be tried till the term following. The seventh alleged that he had refused to dismiss a Grand Jury at New-castle, Delaware, until it placed a printer on trial for sedition. The eighth was concerned with his conduct at Baltimore in 1803; charged him with seeking to stir up the anger of the jury against the Government of the United States and with "prostituting the high judicial character with which he was invested to the low purpose of an electioneering partisan."

Grave as the offenses charged might seem in the eyes of good men, zealous for the dignity of the bench and the purity of the ermine, they were not offenses for which one could be indicted by a Grand Jury. Not a principle of common law,

not an act on any statute book could reach them. How then, argued his counsel, can Judge Chase be impeached? His acts were indeed unwise, in bad taste, deeply to be regretted. But he had committed no high crime. He had been guilty of no misdemeanor.

To this the Managers of the prosecution made answer. The difference, they said, between the terms crimes and misdemeanors as used in the laws and the terms high crimes and misdemeanors as used in the Constitution is precisely the difference between indictment and impeachment. The murderer, the forger, the common thief must be arrested, then indicted and tried. The criminal in the meaning of the Constitution is never arrested. No process issues against the body. No indictment ever sends him to jail. He is merely summoned to appear at the bar and answer the charges against him. The indicted criminal, again, may be deprived of his life, of his liberty, nay, even of his property by heavy costs and fines. The impeached criminal can be deprived of nothing but office and the right to hold office. Does not this difference in the way of trying and in the kind of punishment inflicted mean a difference in the nature of the crimes? Does it not mean that where an indictment lies an impeachment will not? A judge may undoubtedly be indicted for murder? Will any one contend that he may be impeached for murder? Assuredly not, for no man can be tried twice for the same offense. Impeachment then lies for abuse of power done by an officer in his official capacity, by a judge on the bench, by the Vice-President in his seat; indictment lies for acts done by men acting as men and not as officers.

Joseph Hopkinson, who opened the case for the Judge, answered this as follows: The difference between acts impeachable and acts indictable is simply this: every act impeachable is also an act indictable; but every indictable act is not an impeachable act. If this be true it follows that a man may be both indicted and impeached for the same offense; that he may in the language of the Managers be tried twice for the same act. And so he may. For what other meaning can be given to those words of the Constitution so



strangely overlooked by the Managers, those words which follow close on the provision for impeachment, the words "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law"? Impeachment then is no bar to indictment. Indictment is no bar to impeachment. The same man may suffer both for the same crime. But the House cannot impeach him for an act for which a Grand Jury could not indict him. To the House of Representatives, it is true, is given sole power to impeach. So also to Grand Juries is given sole power to indict. But as Grand Juries cannot indict for what is not indictable, so the House of Representatives cannot impeach save for what is impeachable. And what is impeachable? Treason, bribery, and "other high crimes and misdemeanors." The meaning of this is clearly "high," not petty misdemeanors.

Luther Martin took the same position as Hopkinson. Harper went further; narrowed the position taken by his colleagues; maintained that impeachment was a criminal prosecution; that it must be founded on an open violation of law. After explaining his doctrine of impeachment Hopkinson took up the first article. To Philip Barton Key were given articles two, three and four. Charles Lee took up the fifth and sixth. Luther Martin followed, restating the constitutional arguments of Hopkinson, and discussed articles two to six in order. Harper then dealt with the seventh and eighth articles and closed the case for the respondent. On the part of the Managers, Campbell, Early and Rodney each in turn went over every article save the fifth and sixth. Nicholson spoke briefly on the first, second and third. Clarke alone touched on the fifth and sixth and his speech did not take up ten minutes of time. John Randolph closed for the Managers.

When Randolph had finished the Court fixed the first of March as the day for pronouncing judgment. At that time the Senate chamber was crowded to its utmost. The crimson benches of the Senators, the green benches of the Representatives, the women's gallery, the boxes where the wives of

the Secretaries sat, could not have held one person more. Not a Senator was absent. Senator Tracy, of Connecticut, was brought to the Capitol in a coach and carried to his seat that he might vote.

Shortly after noon Vice-President Aaron Burr took the chair, bade the Secretary read the first article of impeachment, and announced that the question would be put to each member on each article separately and that the form of the question would be: "Is Samuel Chase guilty or not guilty of a high crime or misdemeanor as charged in the article just read?" The Secretary then proceeded to call the roll and record the vote on Article One. As this was first in order so was it first in importance. On the charges it contained Randolph had moved for the committee to look into the behavior of Judge Chase; on these charges the impeachment had been based; on these the Managers had spent the most care and argument; and if on these Chase could not be convicted there was no hope of convicting him at all, for it took two-thirds of the Senators, twenty-three votes, to do so. Yet when the last name was called but sixteen Senators answered "Guilty." On the fifth he was unanimously acquitted. On the eighth, the charge to the Baltimore jury, nineteen pronounced him guilty. This was the greatest vote the Managers obtained. As soon as it was recorded Burr rose, looked toward the box in which the accused sat, pronounced him acquitted and bowed. The Judge bowed in return. The Court adjourned not to meet again, and the great trial was ended.\*

### THE TRIAL<sup>1</sup>

*Before the United States Senate, Washington, D. C., January, 1805.*

HON. AARON BURR,<sup>2</sup> *Vice-President,*  
*Presiding.*

\* This narrative is taken from the account of the Trial given in McMaster's Hist. People U. S., Vol. 3.

<sup>1</sup> *Bibliography.* \* "Report of the Trial of the Hon. Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, before the High Court of Impeachment, composed

On January 7, 1804, the House of Representatives, by a vote of 81 to 40, passed the following resolution: That a committee be appointed to inquire into the official conduct of Samuel Chase, one of the associate justices of the Supreme Court of the United States, and of Richard Peters, district judge of Pennsylvania, and to report their opinion, whether the said Samuel Chase and Richard Peters, or either of them, have so acted in their official capacity, as to require the interposition of the constitutional power of this House. And a committee was appointed to inquire into the official conduct of the two judges. On March 12 the committee reported that in consequence of the evidence collected by them, in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, they are of opinion:

First—That Samuel Chase, Esq., one of the associate judges of the Supreme Court of the United States, be impeached of “high crimes and misdemeanors.”

This report was adopted by the House by a vote of 73 to 32, and a committee appointed of which John Randolph was chairman, to appear at the bar of the Senate, to impeach, in the name of the House of Representatives, Samuel Chase, of high crimes and misdemeanors. On December 4, the committee reported articles of impeachment<sup>3</sup> which were adopted, and seven members of the House were elected as managers to conduct the impeachment on behalf of the House.

of the Senate of the United States, for charges exhibited against him by the House of Representatives, in the name of themselves, and of all the People of the United States for High Crimes and Misdemeanors, supposed to have been by him committed, with the necessary Documents and Official Papers, from his Impeachment to final Acquittal. Taken in short hand by Charles Evans, and the arguments of Counsel revised by them from his manuscript. Baltimore. Printed for Samuel Butler and George Keating. 1805.”

\*“Impeachment of Samuel Chase, Esq., one of the Associate Justices of the Supreme Court of the United States, with the Articles exhibited against him by the House of Representatives; in support of their charges for High Crimes and Misdemeanors supposed to have been committed by him, with his Answer and Pleas. Likewise the Replication of the House of Representatives. Baltimore. Printed for Keating’s Book Store. 1805.”

“Trial of Samuel Chase, an Associate Justice of the Supreme Court of the United States, impeached by the House of Representatives for High Crimes and Misdemeanors, before the Senate of the United States. Taken in shorthand by Samuel H. Smith and Thomas Lloyd. 2 vols., 8vo. Washington City, 1805.”

<sup>3</sup> See 1 Am. St. Tr. 6.

\* Article I. That unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them “faithfully and impartially, and without respect to persons,” the said Samuel Chase, on the trial of John Fries

*January 2, 1805.*

The Senate chamber was fitted up in a handsome style as a court—and laid out into apartments for the Senators, the House of Representatives, the managers, the accused, and counsel—the mem-

charged with high treason, before the circuit of the United States, held for the District of Pennsylvania, in the city of Philadelphia, during the months of April and May, one thousand eight hundred, whereat the said Samuel Chase presided, did in his judicial capacity conduct himself in a manner highly arbitrary, oppressive and unjust, viz.:

1. In delivering an opinion, in writing, on the question of the law, on the construction of which the defense of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defense;

2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions, upon which they intended to rest the defense of their client:

3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt, or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give:

In consequence of which irregular conduct of the said Samuel Chase, as dangerous to our liberties; as it is novel to our laws and usages, the said John Fries was deprived of the right, secured to him by the 8th article amendatory of the constitution, and was condemned to death without having been heard, by counsel, in his defense, to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which ultimately rest the liberty and safety of the American people.

Article II. That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond, in the month of May, one thousand eight hundred, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James Thompson Callender was arraigned for a libel on John Adams, then President of the United States, the said Samuel Chase, with intent to oppress, and procure the conviction of the said Callender, did overrule the objections of John Basset, one of the jury, who wished to be excused from serving on the said trial because he had made up his mind as to the publication from which the words, charged to be libellous, in the indictment, were extracted; and the said Basset was accordingly

bers of the executive departments, besides a semi-circular gallery constructed within the area of the chamber.

On the right and left of the President of the Senate, there are two rows of benches, with desks in front, and the whole front and

sworn, and did serve on the jury, by whose verdict the prisoner was subsequently convicted.

Article III. That, with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in, on pretense that the said witness could not prove the truth of the whole of one of the charges, contained in the indictment, although the said charge embraced more than one fact.

Article IV. That the conduct of the said Samuel Chase was marked during the whole course of the said trial by manifest injustice, partiality and intemperance, viz.:

1. In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court for their admission, or rejection, all questions which the said counsel meant to propound to the above named John Taylor, the witness.

2. In refusing to postpone the trial although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused; and although it was manifest, that, with the utmost diligence, the attendance of such witnesses could not have been procured at that term.

3. In the use of unusual, rude and contemptuous expressions towards the prisoner's counsel, and in falsely insinuating that they wished to excite the public fears and indignation, and to produce that insubordination to law, to which the conduct of the judge did, at the same time, manifestly tend:

4. In repeated and vexatious interruptions of the said counsel, on the part of the said judge, which, at length, induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment.

5. In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge as it was subversive of justice.

Article V. And whereas it is provided by the act of Congress passed on the 24th day of September, 1789, entitled "An act to establish the judicial courts of the United States," that for any crime, or offense against the United States, the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the state where such offender may be found. And whereas it is provided by the laws of Virginia, that, upon presentment by any Grand Jury of an offense not capital, the court shall order the clerk to issue a summons against the person, or persons offending, to appear and answer such presentment at the next court; yet the

seats covered with crimson cloth; so that the Senators front the auditory.

The temporary semi-circular gallery, which consists of three ranges of benches, is elevated on pillars and the whole front and

said Samuel Chase did at the court aforesaid, award a *capias* against the body of the said James Thompson Callender, indicted for an offense not capital, whereupon the said Callender was arrested and committed to close custody, contrary to law in that case made and provided.

Article VI. And, whereas, it is provided by the 24th section of the aforesaid act, entitled, "An act to establish the judicial courts of the United States" that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide shall be regarded as the rules of decision in trials at common law in the courts of the United States, in cases where they apply; and, whereas, by the laws of Virginia it is provided, that in cases not capital, the offender shall not be held to answer any presentment of a Grand Jury until the court next succeeding that during which such presentment shall be made. Yet the said Samuel Chase, with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial during the term at which he, the said Callender, was presented and indicted, contrary to law in that case made and provided.

Article VII. That at the circuit court of the United States, for the district of Delaware, held at New Castle, in the month of June, one thousand eight hundred, whereat the said Samuel Chase presided, the said Samuel Chase, disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer, by refusing to discharge the Grand Jury, although entreated by several of the said jury so to do; and after the said Grand Jury had regularly declared, through their foreman, that they had found no bills of indictment, nor had any presentments to make, by observing to the said Grand Jury, that he, the said Samuel Chase, understood "that a highly seditious temper had manifested itself in the state of Delaware among a certain class of people particularly in New Castle county, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order—that the name of this printer was"—but checking himself as if sensible of the indecorum which he was committing, added—"that it might be assuming too much to mention the name of this person, but it becomes your duty, gentlemen, to inquire diligently into this matter," or words to that effect; and that with intention to procure the prosecution of the printer in question, the said Samuel Chase did, moreover, authoritatively enjoin on the District Attorney of the United States the necessity of procuring a file of the papers to which he alluded (and which were understood to be those published under the title of "Mirror of the Times and General Advertiser")

seats covered with green cloth. In this gallery ladies are accommodated, and they assemble in numbers.

On the floor, beneath this temporary gallery, three benches, rising from front to rear, and also covered with green cloth, are oc-

and by a strict examination of them to find some passage which might furnish the ground work of a prosecution against the printer of the said paper, thereby degrading his high judicial functions, and tending to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare.

Article VIII. And whereas mutual respect and confidence between the government of the United States and those of the individual states, and between the people and those governments, respectively, are highly conducive to that public harmony, without which there can be no public happiness, yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did at a circuit court for the district of Maryland, held at Baltimore in the month of May, one thousand eight hundred and three, pervert his official right and duty to address the Grand Jury, then and there assembled, on the matters coming within the province of the said jury, for the purpose of delivering to the said Grand Jury an intemperate and inflammatory political harrangue, with intent to excite the fears and resentment of the said Grand Jury, and of the good people of Maryland against their state, government and constitution, a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the Supreme Court of the United States, and moreover that the said Samuel Chase, then and there, under pretense of exercising his judicial right to address the said Grand Jury, as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said Grand Jury, and of the good people of Maryland against the government of the United States, by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion in a proper manner, were at that time and as delivered by him, highly indecent, extra-judicial and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter, any further articles or other accusation, or impeachment against the said Samuel Chase, and also of replying to his answers which he shall make unto the said articles, or any of them, and of offering proof to all and every of the aforesaid articles, and to all and every other articles, impeachment, or accusation, which shall be exhibited by them, as the case shall require, do demand that the said Samuel Chase may be put to answer the said crimes and misdemeanors, and that such proceedings, examinations, trials and judgments may be thereupon had and given, as are agreeable to law and justice.

cupied by the members of the House of Representatives—on the right is a box for the members of the executive department, foreign ministers, etc.

In front of the members of the House of Representatives are two boxes of two rows of seats—that facing the President's right, is occupied by the managers—that on the other side of the bar for the accused and his counsel—these boxes are covered with blue cloth.

*Judge Chase* asked for a continuance of the trial—that he be given until the first day of the next session (December) to put in his answer and prepare himself with counsel for his trial.

THE SENATE, 21 to 9, ordered that February 4 be the day for receiving the respondent's answer and proceeding to the trial.

*February 4.*

THE COURT OF IMPEACHMENT assembled today. Preceded by the Vice-President, the Senators entered and took their seats, followed by the Speaker of the House of Representatives, the managers and members.

THE VICE-PRESIDENT directed the crier to open the court and Samuel Chase to be called.

*Judge Chase* advanced to the bar, followed by his counsel, the president addressed him, informing him that the time which the Senate had granted to prepare for his defense was now expired, and he desired to know if he was prepared to answer to the charges preferred against him by the House of Representatives.

*Judge Chase* replied that the time allowed him for putting in his answer was not as much as he wished, and that his answer was not so complete as he had desired.

*John Randolph*,<sup>4</sup> *Joseph H. Nicholson*,<sup>5</sup> *Caesar A. Rodney*,<sup>6</sup> *Peter Early*,<sup>7</sup> *George W. Campbell*,<sup>8</sup> *Christopher Clarke*,<sup>9</sup> Managers for the Prosecution.

<sup>4</sup> RANDOLPH, JOHN. (1773-1830.) Born Chesterfield, Va.; representative from Virginia in the Sixth, Fourteenth, Sixteenth, Seventeenth, Eighteenth and Twentieth Congresses; member Constitutional Convention, 1823; United States Senator, 1825; Minister to Russia, 1825-1827. Is popularly known as "John Randolph of Roanoke." He fought an historical duel with Henry Clay. Died in Philadelphia.

<sup>5</sup> NICHOLSON, JOSEPH HOPPER. (1770-1817.) Born and died in Maryland, representative in Congress, 1796-1806; chief judge of the Maryland Circuit Court and a judge of the Maryland Court of Appeals.

<sup>6</sup> RODNEY, CAESAR AUGUSTUS. (1772-1824.) Born Dover, Del.; son of one of the signers of the Declaration of Independence; representative from Delaware in the Eighth and Seventeenth Congresses (1803-1805, 1821-1823); United States Senator, 1823; At-



*Luther Martin*,<sup>10</sup> *Joseph Hopkinson*,<sup>11</sup> *Robert G. Harper*,<sup>12</sup> *Charles Lee*,<sup>13</sup> and *Philip B. Key*,<sup>14</sup> for the Respondent.

torney General of the United States, 1807-1811; Minister to Buenos Ayres, where he died.

<sup>7</sup> **EARLY, PETER.** (1773-1817.) Born Madison Co., Va.; removed to Georgia at an early age; graduated Princeton, 1792; studied law in Philadelphia and began practice in Georgia; elected to Seventh Congress to fill a vacancy; re-elected to Eighth and Ninth, and served January 10, 1803, to March 3, 1807; judge of Ocmulgee district four years, governor of Georgia, 1813-1815; state senator at time of his death, which occurred near Greensboro, Greene Co., Ga. See Knight, *L. L. Georgia's Landmarks*, 1913, I, 526. Georgia, comprising sketches of counties, towns, etc., 1906.

<sup>8</sup> **CAMPBELL, GEORGE WASHINGTON.** (1768-1848.) Graduated Princeton, 1794; commenced practice of law in Nashville, Tenn.; elected as Democrat to Eighth, Ninth and Tenth Congress (March 4, 1803-March 3, 1809), serving as chairman of Ways and Means Committee during last term; United States Senator October 8, 1811, to February 11, 1814, and again December 4, 1815, to April, 1818; Secretary of Treasury under President Madison in 1814; minister to Russia, 1818-1821; member of French Claims Commission, 1831; judge of Supreme Court of Errors and Appeals of Tennessee; died Nashville. See Wooldridge, *Hist. of Nashville, Tenn.*

<sup>9</sup> **CLARKE, CHRISTOPHER.** (1767-1828.) Born Albermarle Co., Va.; several times a member of state legislature; elected as a Jeffersonian Democrat to Eighth Congress to fill a vacancy; re-elected to Ninth Congress and served from Nov. 5, 1804 to July 1, 1806, when he resigned; died near New London, Va.

<sup>10</sup> See 1 Am. St. Tr. 73.

<sup>11</sup> See 7 Am. St. Tr. 678.

<sup>12</sup> **HARPER, ROBERT GOODLOE.** (1765-1825.) Born near Fredericksburg, Va.; removed at an early age to South Carolina; at 15 joined S. C. volunteer militia and served for a time under Gen. Greene; graduated Princeton, 1785; admitted to bar, 1786; member S. C. Legislature; elected from Maryland to Third Congress to fill a vacancy; re-elected to Fourth, Fifth and Sixth and served February 9, 1795, to March 3, 1801; an ardent Federalist and recognized leader of his party in the House, 1799-1801. Settled in Baltimore, 1801; married daughter of Charles Carroll, of Carrollton, and became one of leading lawyers of country; served as major-general of militia in war of 1812; elected to United States Senate for term beginning March 4, 1815; resigned January, 1816, to become candidate for vice-presidential nomination, which he failed to receive. One of the chief promoters of scheme for colonizing free negroes in Africa, which resulted in the founding of Liberia. His "Observations on the Dispute Between the United States and France" (1797) attained celebrity. A collection of his

Proclamation was made that Samuel Chase appear or that default would be recorded. *Judge Chase* appeared accordingly.

VICE-PRESIDENT BURR informed him that having been summoned to answer the articles of impeachment exhibited against him by the House of Representatives the Senate was ready to receive any answer he had to make.

The articles of impeachment were eight in number.

1. Misconduct on the trial of John Fries (*ante*, p. 146), (1) in delivering an opinion on a question of law before counsel had been heard in his defense; (2) in restricting the counsel from referring to English authorities or citing United States statutes; (3) in debarring the prisoner from addressing the jury (through his counsel) on questions of law.

2. Misconduct on the trial of James T. Callender (see 10 Am. St. Tr. 813) in refusing to overrule the objections of John Basset to serve on the jury.

3. Misconduct on the trial of James T. Callender in refusing to permit John Taylor to be examined as to witness.

4. Rude, contemptuous and indecent conduct during the

letters, addresses, etc., was published under title: *Select Works of Robert Goodloe Harper* (Baltimore, 1814).

<sup>13</sup> LEE, CHARLES. (1785-1815.) Born Leesylvania, Fauquier Co., Va.; graduated College of New Jersey (A. B. 1775, A. M. 1778); studied law in Philadelphia in the office of Jared Ingersoll; practiced law in Westmoreland Co., Va., and was for several terms a representative in the Virginia assembly; delegate to the Continental Congress; after adoption of Constitution held position of naval officer of Potomac district until appointed Attorney-General by President Washington, December 10, 1795; served as Attorney-General until 1801. President Jefferson offered him chief justiceship of Supreme Court, which he declined; died Fauquier Co., Va.

<sup>14</sup> KEY, PHILIP BARTON. (1757-1815.) Born Cecil Co., Md.; educated in England; served in British army during Revolution, becoming captain in 1782; taken prisoner, he was released on parole and returned to England, retiring on half pay after peace was made; returned to Maryland, 1785, and won high rank as a lawyer; several times member Maryland House of Representatives; located in Annapolis, 1790; removed to Georgetown, D. C., 1801; elected as a Federalist to Tenth, Eleventh and Twelfth Congresses (March 4, 1807-March 3, 1813), having, in 1807, formally renounced all claim on the British government; died at Georgetown.

trial of James T. Callender (1) in compelling his counsel to reduce to writing the questions they decided to ask a witness—Taylor; (2) in refusing to postpone the trial on account of the absence of material witnesses; (3) in using rude and contemptuous expressions to Callender's counsel; (4) in vexatious interruptions of counsel causing them to withdraw from defense; (5) in indecent solicitude for the conviction of the accused.

5. Misconduct in issuing a bench warrant instead of a summons in said trial.

6. Misconduct in refusing a continuance of said trial.

7. Misconduct in charging the Grand Jury and refusing to discharge them at Newcastle, Delaware, in June, 1800.

8. Misconduct in charging the jury at Baltimore, Maryland, in May, 1803.

*Judge Chase* read the introductory part of his answer, he then handed it to *Mr. Harper* who continued to read until two o'clock, when *Mr. Hopkinson* continued the reading to four o'clock, then *Mr. Harper* continued for about half an hour; the Judge himself read the closing part.

As to Article 1 (1), the respondent pleaded that at the trial of the Western Insurgents in March, 1795, before Judges Paterson and Peters (see *post*, pp. 631, 644), the question as to whether resisting by force the execution of a law of the United States was treason had been decided in the affirmative by those judges after argument by counsel, among them William Lewis, who was counsel for Fries; that on the first trial of Fries before Judges Iredell and Peters, the same question was argued by William Lewis and Alexander J. Dallas and was decided against them by the judge (see *ante*, p. 1); that the prisoner Fries having been granted a new trial, the second hearing came before the respondent and Judge Peters; that he thought it proper to save time to draw up an opinion on this settled point which he submitted to Judge Peters who sat with him and who concurred; and gave copies of that opinion which followed the law laid down by the previous judges to the Counsel for the prisoner (see 11 Am. St.

Tr. 1). If the opinion was erroneous was he more censurable than the eminent judges who had given it and whose views he followed? If the opinion was correct what harm was done?<sup>15</sup>

<sup>15</sup> "In the first of these (Northampton) trials, that of Vigol, the defense of the prisoner was conducted by very able counsel, one of whom, William Lewis, Esq., is the same person who appeared as counsel for John Fries, in the trial now under consideration. Neither that learned gentleman, nor his able colleague, then thought proper to raise the question of law, 'whether resisting and preventing by armed force, the execution of a particular law of the United States, be a 'levying of war against the United States,' according to the true meaning of the constitution? although a decision of this question in the negative, must have acquitted the prisoner. But in the next trial, that of Mitchell, this question was raised on the part of the prisoner, and was very fully and ably discussed by his counsel; and it was solemnly determined by the court, both the judges concurring, 'that to resist or prevent by armed force, the execution of a particular law of the United States, is a levying of war against the United States, and consequently is treason, within the true meaning of the constitution.' The decision, according to the best established principles of our jurisprudence, became a precedent for all courts of equal or inferior jurisdiction; a precedent which, although not absolutely obligatory, ought to be viewed with very great respect, especially by the court in which it was made, and ought never to be departed from, but on the fullest and clearest conviction of its incorrectness.

"In the first Fries trial before Judges Iredell and Peters, which was conducted with great solemnity, and occupied nine days, the prisoner was assisted by William Lewis, and Alexander James Dallas, Esqs., two very able and eminent counsellors; the former of whom, William Lewis, is the person who assisted as above-mentioned, in conducting the defense of Vigol, on a similar indictment. These gentlemen, finding that the facts alleged were fully and undeniably proved, by a very minute and elaborate examination of witnesses, thought proper to rest the case of the prisoner, on the question of law which had been determined in the cases of Vigol and Mitchell above mentioned, and had then been acquiesced in, but which they thought proper again to raise. They contended, 'that to resist by force of arms a particular law of the United States does not amount to levying war against the United States, within the true meaning of the constitution, and therefore it is not treason, but a riot only.' This question they argued at great length, and with all the force of their learning and genius; and after a very full discussion at the bar, and the most mature deliberation by the court, the learned and excellent judge who then presided, and who was no less distinguished by his humanity and tenderness towards persons tried before him, than by his extensive knowledge

As to Article 1 (2) the respondent pleaded that he had ruled that English decisions in the law of treason before the

and great talents as a lawyer, pronounced the opinion of himself and his colleague, 'that to resist or prevent by force, the execution of a particular law of the United States, does amount to levying war against them, within the true meaning of the constitution, and does therefore constitute the crime of treason,' thereby adding the weight of another and more solemn decision, to the precedent which had been established in the above mentioned cases of Vigol and Mitchel.

"Under this opinion of the court on the question of law, the jury, having no doubt as to the facts, found the said John Fries guilty of treason, on the above mentioned indictment. But a new trial was granted by the court, not by reason of any doubt as to the correctness of the decision on the question of law, but solely on the ground, as this respondent hath understood and believes, that one of the jurors of the petit jury, after he was summoned, but before he was sworn on the trial, had made some declaration unfavorable to the prisoner.

"In the second trial of William Lewis and Alexander James Dallas, Esqs., the same persons who had conducted his defense at his former trial were again at his request assigned by the court as his counsel. On this trial the respondent was the presiding judge.

"After this indictment was found by the Grand Jury, this respondent considered it with great care and deliberation, and finding, from the three overt acts of treason which it charged, that the question of law arising upon it, was the same question which had already been decided twice in the same court, on solemn argument and deliberation, and one in that very case, he considered the law as settled by those decisions, with the correctness of which on full consideration he was entirely satisfied; and by the authority of which he should have deemed himself bound, even had he regarded the question as doubtful in itself. They are moreover in perfect conformity with the uniform tenor of decisions in the courts of England and Great Britain, from the revolution in 1668, to the present time, which in his opinion, added greatly to their weight and authority.

"And surely, we need not urge to this honorable court, the correctness, the importance, and the absolute necessity of adhering to principles of law once established, and of considering the law as finally settled, after repeated and solemn decisions by courts of competent jurisdiction. A contrary principle would unsettle the basis of our whole system of jurisprudence, hitherto our safeguard and our boast; would reduce the law of the land and subject the rights of the citizen, to the arbitrary will, the passions or the caprice of the judge in each particular case; and would substitute the varying opinions of various men, instead of that fixed, permanent rule, in which the very essence of the law consists. If this respondent erred in regarding this point as settled, by the repeated

Revolution of 1688 should not be read to the jury. In his opinion they were not the law in the United States and would

and solemn adjudications of his predecessors, in the same court and in the same case; if he erred in supposing, that a principle established by two solemn decisions, was obligatory upon him, sitting in the same court where those decisions had been made; if he erred in believing that it would be the highest presumption in him, to set up his opinion and judgment over that of his colleague, who had twice decided the same question, and of two of his predecessors, who justly rank among the ablest judges that have ever adorned a court; if in all this he erred, it is an error of which he cannot be ashamed, and which he trusts will not be deemed criminal in the eyes of this honorable court, of his country, or of that posterity by which he, his accusers and his judges, must one day be judged.

"Under the influence of these considerations, this respondent drew up an opinion on the law, arising from the overt acts stated in the said indictment, which was conformable to the decisions before given as above mentioned, and which he sent to his colleague the said Richard Peters, for his consideration. That gentleman returned it to this respondent, with some amendments affecting the form only, but not in any manner touching the substance.

"The opinion thus agreed to, this respondent thought it proper to communicate to the prisoner's counsel—several reasons concurred in favor of this communication.

"In the first place, this respondent considered himself and the court, as bound by the authority of the former decisions; especially the last of them, which was on the same case. He considered the law as settled, and had every reason to believe that his colleague viewed it in same light. It was not suggested or understood, that any new evidence was to be offered; and he knew that if any should be offered which could vary the case, it would render wholly inapplicable both the opinion and the former decisions on which it was founded. And he could not and did not suppose that the prisoners counsel would be desirous of wasting very precious time in addressing to the court a useless argument on a point which that court held itself precluded from deciding in their favor. He therefore conceived that it would be rendering the counsel a service and a favor, to apprise them beforehand of the view which the court had taken of the subject; so as to let them see in time the necessity of endeavoring to produce new testimony which might vary the case, and take it out of the authority of former decisions.

"Secondly. There were more than one hundred civil causes then depending in the said court, as appears by the exhibit marked No. 1, which this respondent prays may be taken as part of this, his answer. Many of those causes had already been subjected to great delay, and it was the peculiar duty of this respondent, as presiding judge, to take care, that as little time as possible should be unnecessarily consumed, and that every convenient and proper dispatch should be given to the business of the citizens. He did believe

if read to them simply mislead the jury. The Senate is not a court of appeal to rule on the correctness of his opinion but

that an early communication of the court's opinion might tend to the saving of time, and consequently to the dispatch of business.

"Thirdly. As the court held itself bound by the former decisions, and could not, therefore, alter its opinion in consequence of any argument; and as it was the duty of the court to charge the jury on the law, in all cases submitted to their consideration, he knew that this opinion must not only be made known at some period or other of the trial, but must at the end of the trial be expressly delivered to the jury by him, in a charge from the bench; and he could not suppose and cannot yet imagine, that an opinion, which was to be thus solemnly given in charge to the jury at the close of the trial, could make any additional impression on their minds, from the circumstance of its being intimated to the counsel before the trial began, in the hearing of those who might be afterwards sworn on the jury.

"And lastly, it was then his opinion, and still is, that it is the duty of every court of this country, and was his duty on the trial now under consideration, to guard the jury against erroneous impressions respecting the laws of the land. He well knows, that it is the right of juries in criminal cases to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law, and that hence results the power of juries to decide on the law as well as on the facts in all criminal cases. This power he holds to be a sacred part of our legal privileges, which he never attempted and never will attempt, to abridge or to obstruct. But he also knows that in the exercise of this power, it is the duty of the jury to govern themselves by the laws of the land, over which they have no dispensing power; and their right to expect and receive from our court, all the assistance which it can give, for rightly understanding the law. To withhold this assistance, in any manner whatever, to forbear to give it in that way, which may be most effectual for preserving the jury from error and mistake, would be an abandonment or forgetfulness of duty which no judge could justify to his conscience or to the laws. In this case, therefore, where the question of law arising on the indictment had been finally settled by authoritative decisions, it was the duty of the court, and especially on this respondent as presiding judge, early to apprise the counsel and the jury of these decisions and their effect, so as to save the former from the danger of making an improper attempt, to mislead the jury in a matter of law, and the jury from having their minds preoccupied by erroneous impressions.

"It was for these reasons that on the 22nd day of April, 1800, when the said John Fries was brought into court, and placed in the prisoner's box for trial, but before the petit jury was impanelled to try him, this respondent informed the above mentioned William Lewis, one of his counsel, the aforesaid Alexander James Dallas

only for the purity of his motives in delivering that opinion. The respondent denies that he prevented any act of Congress

not being then in court, that the court had deliberately considered the indictment against John Fries for treason, and the three several overt acts of treason stated therein. That the crime of treason was defined by the constitution of the United States; that as the Federal legislature had the power to make, alter or repeal laws, so the judiciary only had the power, that it was their duty to declare, expound and interpret the constitution and laws of the United States. That it was the duty of the court, in all criminal cases, to state to the petit jury, their opinion of the law arising on the facts; but the jury in all criminal cases were to decide both the law and the facts, on a consideration of the whole case. That there must be some constructive exposition of the terms used in the constitution, 'levying war against the United States;' that the question, what acts amounted to levying war against the United States, or the government thereof, was a question of law, and had been decided by Judges Patterson and Peters in the cases of Vigol and Mitchell, and by Judges Iredell and Peters in the case of John Fries, prisoner at the bar in April, 1799. That Judge Peters remained of the same opinion, which he had twice before delivered, and he, this respondent, on long and great consideration, concurred in the opinion of Judges Patterson, Iredell and Peters; that to prevent unnecessary delay, and to save time on the trial of John Fries, and to prevent a delay of justice, in the great number of civil causes depending on trial at that term, the court had drawn up in writing, their opinion of the law, arising on the overt acts, stated in the indictment against John Fries; and had directed David Caldwell their clerk, to make out three copies of their opinion, one to be delivered to the attorney of the district, one to the counsel for the prisoner, and one to the petit jury, after they should have been impanelled and heard the indictment read to them by the clerk, and after the district attorney should have stated to them the law on the overt acts alleged in the indictment as it appeared to him.

"Upon these observations this respondent delivered one of the above-mentioned copies to the aforesaid William Lewis, then attending as one of the prisoner's counsel, who read part of it, and then laid it down on the table before him. Some observations were then made on the subject, by him and the above-mentioned Alexander James Dallas, who had then come into court; but this respondent doth not now recollect those observations, and cannot undertake to state them accurately.

"And this respondent further saith, that the paper marked exhibit No. 2, and herewith exhibited, which he prays leave to make part of this his answer, is a true copy of the original opinion, drawn up by him and concurred in by the said Richard Peters, as above set forth, which original opinion is now in the possession of this respondent, ready to be produced to this honorable court. He



from being cited to the Court or read to the jury. He was of opinion that the Sedition Act was not relevant on a trial

may have erred in forming this opinion, and in the time and manner of making it known to the counsel for the prisoner. If he erred in forming it, he erred in common with his colleague and with two of his predecessors; and he presumes to hope that an error which has never been deemed criminal in them, will not be imputed as a crime to him, who was led into it by their example and their authority. If he erred in the time and manner of making known this opinion, he feels a just confidence, that when the reasons which he has alleged for his conduct, and by which it seemed to him to be fully justified, shall come to be carefully weighed, they will be sufficient to prove, if not that this conduct was perfectly regular and correct, yet that he might sincerely have considered it as right; and that in a case where so much doubt may exist, to have committed a mistake is not to have committed a crime.

"And this respondent further answering insists that the opinion thus delivered to the prisoner's counsel, viz.: that 'any insurrection or rising of any body of people within the United States, for the purpose of resisting or preventing by force or violence, under any pretense whatever, the execution of any statute of the United States for levying or collecting taxes, or for any other object of a general or national concern, is levying war against the United States within the contemplation and true meaning of the constitution of the United States, is a legal and correct opinion, supported not only by the two previous decisions above mentioned, but also by the plainest principles of law and reason, and by the uniform tenor of legal adjudications in England and Great Britain, from the revolution in 1688 to this time. It ever was, and now is his opinion, that the peace and safety of the national federal government, must be endangered, by any other construction of the terms 'levying war against the United States,' used by the federal constitution; and he is confident that no judge of the federal government, no judge of a superior state court, nor any gentleman of established reputation for legal knowledge would or could deliberately give a contrary opinion.

"If, however, this opinion were erroneous, this respondent would be far less censurable than his predecessors, by whose example he was led astray, and by whose authority he considered himself bound. Was it an error to consider himself bound by the authority of their previous decisions? If it were, he was led into the error by the uniform course of judicial proceedings, in this country and England, and is supported in it, by one of the fundamental principles of our jurisprudence. Can such an error be a crime or misdemeanor?

"If, on the other hand, the opinion be in itself correct, as he believes and insists that it is, could the expression of a correct opinion on the law, whenever and however made, mislead the jury, infringe

for treason; but as he has just pointed out, if this opinion was wrong that is not a crime.<sup>16</sup>

their rights, or give an improper bias to their judgment? Could truth excite improper prejudice? Could the jury be less prepared to hear the law discussed, and to decide on it correctly, because it was correctly stated to them by the court? And is not that a new kind of offense, in this country at least, which consists in telling the truth, and giving a correct exposition of the law."

"These are the opinions which he did on that occasion deliver to the counsel for the prisoner, and which he then thought, and still thinks, it was his duty to deliver. The counsellors admitted to practice in any court of justice, are, in his opinion, and according to universal practice, to be considered as officers of such courts and ministers of justice therein, and as such, subject to the direction and control of the court, as to their conduct in its presence, and in conducting the defense and criminals on trial before it. As counsel, they owe to the person accused, diligence, fidelity and secrecy, and to the court and jury, due and correct information according to the best of their knowledge and ability, on every matter of law which they attempt to adduce in argument. The court, on the other hand, hath power, and is bound in duty to decide and direct what evidence, whether by record or by precedents of decisions in courts of justice, is proper to be admitted for the establishment of any matter of law or fact. Consequently, should counsel attempt to read to a jury, as a law still in force, a statute which had been repealed, or a decision which had been reversed, or the judgments of courts in countries whose laws have no connection with ours, it would be the duty of the court to interpose, and prevent such an imposition from being practiced on the jury. For these reasons, this respondent thinks that his conduct was correct in expressing to counsel for Fries, the opinions stated above. He is not bound to answer here for the correctness of those principles, though he thinks them incontestable; but merely for the correctness of his motives in delivering them. A contrary opinion would convert this honorable court from a court of impeachment into a court of appeals, and would lead directly to the strange absurdity that whenever the judgment of an inferior court should be reversed on appeal or writ or error, the judges of that court must be convicted of high crimes and misdemeanors, and turned out of office. That error in judgment is a punishable offense, and that crimes may be committed without any criminal intention. Against a doctrine so absurd and mischievous, so contrary to every notion of justice hitherto entertained, so utterly subversive of all that part of our system of jurisprudence, which has been wisely and humanely established for the protection of innocence, this respondent deems it his duty now, and on every fit occasion, to enter his protest and lift up his voice; and he trusts that in the discharge of this duty infinitely more important to his country than to himself, he shall find approbation and support in the heart of every American, of

As to Article 1 (3) the respondent declared that he told the counsel for Fries that they might argue the question of

every man throughout the world who knows the blessings of civil liberty, or respects the principles of universal justice.

"It is only then, for the correctness of his motives in delivering these opinions, that he can now be called to answer; and this correctness ought to be presumed, unless the contrary appear by some direct proof, or by some violent presumption arising from his general conduct on the trial, or from the glaring impropriety of the opinion itself. For he admits that cases may be supposed, of an opinion delivered by a judge so palpably erroneous, unjust and oppressive, as to preclude the possibility of its having precedent from ignorance or mistake."

<sup>16</sup> "This honorable court need not be informed that there has existed in England no such thing as treason at common law, since the year 1350. When the statute of the 25th, Edward III., chap. 2, declaring what alone should in future be judged treason, was passed. It is perfectly clear that decisions made before that statute, 450 years ago, when England, together with the rest of Europe, was still wrapped in the deepest gloom of ignorance and barbarism; when the system of English jurisprudence was still in its infancy; when law, justice and reason, were perpetually trampled under foot by feudal oppression and feudal anarchy; when under an able and vigorous monarch, everything was adjudged to be treason which he thought fit to call so, and under a weak one, nothing was considered as treason which turbulent, powerful and rebellious nobles thought fit to perpetrate; is it perfectly clear that decisions, made at such a time, and under such circumstances, ought to be received by the courts of this country as authorities to govern their decisions, or lights to guide the understanding of juries? Is it perfectly clear that decisions made in England, on the subject of treason, before the revolution of 1688, by which alone the balance of the English constitution was adjusted and the English liberties were fixed on a firm basis; decisions made either during the furious civil wars, in which two rival families contended for the crown; when in the vicissitudes of war, death and confiscation in the forms of law, continually walked in the train of the victors, and actions were treasonable or praiseworthy, according to the preponderance of the party by whose adherents they were perpetrated; during the reigns of three able and arbitrary monarchs who succeeded this dreadful conflict, and relaxed or invigorated the law of treason, according to their anger, their policy, or their caprice; or during those terrible struggles between the principles of liberty, not yet well defined or understood, on one hand, and arbitrary power, insinuating itself under the forms of the constitution on the other; struggles which presented at some times the widest anarchy, at others the extremes of servile submission, and after having brought one king to the scaffold, ended in the expulsion of another from his throne? Is it

law to the jury if they pleased but they refused to do so, and withdrew from the case. And he denied that he did in any

clear that decisions on the law of treason, made in times like these, ought not only to be received as authorities in the courts of this country, but also to have great influence on their decisions? Is it clear that decisions made in England, as to what acts will amount to levying war against the king, personally, and not against his government, are applicable to the constitution and laws of this country? Is it clear that such English decisions on the subject of treason, as are applicable to our constitution and laws, are to be received in our courts, not merely as the opinions of learned and able men, which may enlighten their judgment, but as authorities which ought to govern absolutely their decisions? Is all this so clear that a judge could not honestly and sincerely have thought the contrary? That he could not have expressed an opinion to the contrary without corrupt or improper motives? If it be not thus clear, then must it be admitted that this respondent, sincerely and honestly, and in the best of his judgment, considered these decisions at wholly inadmissible, or admissible only for the purposes and to the extent which he pointed out. And if he did so consider them, was it not his duty to prevent them from being read to the jury, except under those restrictions, and for those purposes? Would his duty permit him to sit silently, and see the jury imposed on and misled? To sit silently and hear a book read to them as containing the law, which he knew did not contain the law? Such silence would have rendered him a party to the deception, and would have justly subjected him to all the contumely, which a conscientious and courageous discharge of his duty, has so unmeritedly brought on his name.

"With respect to the statutes of the United States, which he is charged with having prevented the prisoner's counsel from citing on the aforesaid trial, he denies that he prevented any act of Congress from being cited, either to the court or jury, on the said trial; or declared at any time, that he would not permit the prisoner's counsel to read to the jury, or to the court, any act of Congress whatever. Nor does he remember or believe, that he expressed on the said trial any disapprobation of the conduct of the circuit court before whom the said case was first tried, in permitting the act of Congress relating to crimes less than treason, commonly called the sedition act, to be read to the jury. He admits indeed that he was then and still is of opinion, that the said act of Congress wholly was irrelevant to the issue, in the trial of John Fries, and therefore ought not to have been read to the jury, or regarded by them. This opinion may be erroneous, but he trusts that the following reasons on which it was founded, will be considered by this honorable court, as sufficiently strong to render it possible, and even probable, that such an opinion might be sincerely held and honestly expressed:—1st, that Congress did not intend by the sedition law to define the crime of treason by 'levying war.' Treason and sedition are

manner during the trial conduct himself arbitrarily, unjustly or oppressively as charged.<sup>17</sup>

crimes very distinct in their natures, and subject to very different punishments; the former by death, and the latter by fine and imprisonment. 2nd, the sedition law makes a combination or conspiracy, with intent to impede the operation of any law of the United States, or the advising or attempting to procure any insurrection or riot, a high misdemeanor, punishable by fine and imprisonment; but a combination or conspiracy with intent to prevent the execution of a law, or with intent to raise an insurrection for that purpose, or even with intent to commit treason, is not treason by 'levying war' against the United States, unless it be followed by an attempt to carry such combination or conspiracy into effect, by actual force or violence. 3rd, the constitution of the United States is the fundamental and supreme law, and having defined the crime of treason, Congress could not give any legislative interpretation or exposition of that crime, or of the part of the constitution by which it is defined. 4th, the judicial authority of the United States is alone vested with power to expound their constitution and laws.

"And this respondent further answering saith, that after the above mentioned proceedings had taken place in the said trial, it was postponed until the next day, Wednesday, April 23, 1800; when at the meeting of the court this respondent told both the above mentioned counsel for the prisoner, 'that to prevent any misunderstanding of any thing that had passed the day before, he would inform them, that although the court retained the same opinion of the law, arising on the overt acts charged in the indictment against Fries, yet the counsel would be permitted to offer arguments to the court, for the purpose of showing them that they were mistaken in the law; and that the court, if satisfied that they had erred in opinion, would correct it: and also that the counsel would be permitted to argue before the petit jury, that the court were mistaken in the law.' And this respondent added, that the court had given no opinion as to the facts in the case, about which both the counsel had declared that there would be no controversy.

"After some observations by the said William Lewis and Alexander James Dallas, they both declared to the court, that they did not any longer consider themselves as the counsel for John Fries, the prisoner. This respondent then asked the said John Fries whether he wishes the court to appoint other counsel for his defense. He refused to have other counsel assigned; in which he acted, as this respondent believes and avers, by the advice of the said William Lewis and Alexander James Dallas: whereupon the court ordered the said trial to be had on the next day, Thursday, the 24th of April, 1800."

<sup>17</sup> "And this respondent further answering saith, that if the two instances of misconduct, first stated in support of the general charge contained in the first article of impeachment, were true as alleged, yet the inference drawn from them, viz., 'that the said Fries was

As to Article 2, the respondent pleaded that John Basset, with seven other jurors, were asked "if they ever formed or delivered any opinion respecting the subject to be tried or concerning the charges in the indictment." They all answered in the negative and they with the four other jurors were sworn, no objection being made by Callender or his counsel. He admits that before he was sworn Basset asked to be excused because Basset had made up his mind that the book

hereby deprived of the benefit of counsel for his defense,' is not true. He insists that the said Fries was deprived of the benefit of counsel, not by any misconduct of this respondent, but by the conduct and advice of the above mentioned William Lewis and Alexander James Dallas, who having been, with their own consent, assigned by the court as counsel for the prisoner, withdrew from his defense, and advised him to refuse other counsel when offered to him by the court, under the pretense that the law had been prejudged, and their liberty of conducting the defense, according to their own judgment, improperly restricted by this respondent; but in reality because they knew the law and the facts to be against them, and the case to be desperate, and supposed that their withdrawing themselves under this pretense might excite odium against the court; might give rise to an opinion that the prisoner had not been fairly tried; and in the event of a conviction, which from their knowledge of the law and the facts, they knew to be almost certain, might aid the prisoner in an application to the President for a pardon. That such was the real motive of the said prisoner's counsel, for depriving their client of legal assistance on this trial, this respondent is fully persuaded, and expects to make appear, not only from the circumstances of the case, but from their own frequent and public declarations.

"As little can this respondent be justly charged with having by any conduct of his, endeavored to 'wrest from the jury their indisputable right to hear argument, and determine upon the question of law as well as the question of fact involved in the verdict which they were required to give.' He denies that he did at any time declare that the aforesaid counsel should not at any time address the jury, or did in any manner, hinder them from addressing the jury on the law as well as on the facts arising in the case. It was expressly stated in the copy of his opinion delivered as above set forth to William Lewis, that the jury had a right to determine the law as well as the fact: and the said William Lewis and Alexander James Dallas were expressly informed, before they declared their resolution to abandon the defense, that they were at liberty to argue the law to the jury. This respondent believes that the said William Lewis did not read the opinion delivered to him as aforesaid, except a very small part at the beginning

"The Prospect Before Us," on which the indictment was laid, but which he had never seen, was within the sedition law. But the respondent did not think this a sufficient reason for withdrawing him from the jury. He is still of that opinion; so was and is Judge Griffin who sat with him. If he is to be punished for making an erroneous ruling, why is not Judge Griffin impeached also?<sup>18</sup>

of it, and of course, acted upon it without knowing its contents; and that the said Alexander James Dallas read no part of the said opinion until about a year ago, when he saw a very imperfect copy, made in court by a certain W. S. Biddle.

"If his opinions were incorrect, his mistake in adopting them, or in the time or manner of expressing them, cannot be imputed to him as an offense of any kind, much less as an high crime and misdemeanor, for which he ought to be removed from office; unless it can be shown by clear and legal evidence, that he acted from corrupt motives. Should it be considered that some impropriety is attached to his conduct, in the time and mode of expressing any of these opinions; still he apprehends, that a very wide difference exists between such impropriety, the casual effect of human infirmity, and a high crime and misdemeanor for which he may be impeached, and must on conviction be removed from office."

<sup>18</sup> "The petit jurors being called over, eight of them appeared, namely, Robert Gamble, Bernard Mackham, John Barrell, William Austin, William Richardson, Thomas Tinsley, Matthew Harvey and John Basset; who as they came to the book to be sworn, were severally asked on oath, by direction of the court, 'whether they had ever formed and delivered any opinion respecting the subject matter then to be tried, or concerning the charges contained in the indictment?' They all answered in the negative, and were sworn in chief to try the issue. The counsel for the said Callender declaring, that it was unnecessary to put this question to the other four jurymen, William Mayo, James Hayes, Henry S. Shore and John Prior, they also were immediately sworn in chief. No challenge was made by the said Callender or his counsel, to any of these jurors; but the said counsel declared, that they would rely on the answer that should be given by the said jurors to the question thus put by order of the court.

"After the above-mentioned John Basset, whom this respondent supposes and admits to be the person mentioned in the article of impeachment now under consideration, had thus answered in the negative, to the question put to him by order of the court, as above mentioned, which this respondent states to be the legal and proper question, to be put to jurors on such occasions, he expressed to the court, his wish to be excused from serving on the said trial, because

As to Article 3 the respondent pleaded that the indictment against Callender contained twenty distinct libels against President Adams and as to only one of them, the twelfth, which was that John Adams was "a professed aristocrat, he

he had made up his mind, or had formed his opinion, 'that the publication, called "the Prospect Before Us," from which the words charged in the indictment as libellous, were said to be extracted, but which he had never seen, was, according to the representation of it, which he had received, within the sedition law.' But the court did not consider this declaration by the said John Basset, as a sufficient reason for withdrawing from the jury, and accordingly directed him to be sworn in chief.

"In this opinion and decision, as in all the others delivered during the trial in question, this respondent concurred with his colleague, Cyrus Griffin, in whom none of these opinions have been considered as criminal. He contends that the opinion itself was legal and correct; and he denies that he concurred in it, under the influence of any 'spirit of persecution and injustice,' or with any 'intent to oppress and procure the conviction of the prisoner;' as is most untruly alleged by the second article of impeachment. His reasons were correct and legal. He will submit them with confidence to this honorable court; which, although it cannot condemn him for an incorrect opinion, proceeding from an honest error in judgment, and ought not to take on itself the power of enquiring into the correctness of his decisions, but merely that of examining the purity of his motives; will, nevertheless weigh his reasons, for the purpose of judging how far they are of sufficient force, to justify a belief that they might have appeared satisfactory to him. If they might have so appeared, if the opinion which he founded on them be not so palpably and glaringly wrong, as to carry with it internal evidence of corrupt motives, he cannot in delivering it have committed an offense.

"This juror had formed no opinion about the guilt or innocence of the party accused; which depended on four facts wholly distinct from the opinion which he had formed. First, whether the contents of the book were really such as had been represented to him? Secondly, whether they should, on the trial, be proved to be true? Thirdly, whether the party accused was really the author or publisher of this book? And fourthly, whether he wrote or published it 'with intent to defame the President, or to bring him into contempt or disrepute, or to excite against him the hatred of the good people of the United States?' On all these questions, the mind of the juror was perfectly at large, notwithstanding the opinion which he had formed. He might, consistently with that opinion, determine them all in the negative; and it was on them that the issue between the United States and James Thompson Callender depended. Consequently, this juror, notwithstanding the opinion



proved faithful and serviceable to the British interest"; was Taylor offered as a witness to prove the truth. Of what use was his evidence, when as to the other nineteen libels there was no defense made?<sup>19</sup>

which he had thus formed, did stand indifferent as to the matter in issue, in the legal and proper sense, and in the only sense in which such indifference can ever exist; and therefore his having formed that opinion, was not such an excuse as could have justified the court in discharging him from the jury.

"That this juror did not himself consider this opinion as an opinion respecting the 'matter in issue,' appears clearly from this circumstance, that when called upon to answer on oath, 'whether he had expressed any opinion as to the matter in issue?' he answered that he had not. Which clearly proves that he did not regard the circumstance of his having formed this opinion, as a legal excuse, which ought to exempt him of right from serving on the jury; but merely suggested it as a motive of delicacy, which induced him to wish to be excused. To such motives of delicacy, however commendable in the persons who feel them, it is impossible for courts of justice to yield, without putting it in the power of every man under pretense of such scruples, to exempt himself from those duties which all the citizens are bound to perform. Courts of justice must regulate themselves by legal principles, which are fixed and universal, not by delicate scruples, which admit of endless variety, according to the varying opinions and feelings of men.

"Such were the reasons of this respondent, and he presumes of his colleague the said Cyrus Griffin, for refusing to excuse the said John Basset, from serving on the jury above mentioned. These reasons, and the decision founded on them, he insists were legal and valid. But if the reasons should be considered as invalid, and the decision as erroneous, can they be considered as so clearly and flagrantly incorrect, as to justify a conclusion that they were adopted by this respondent, through improper motives? Are not these reasons sufficiently plausible, to justify a candid and liberal mind in believing, that a judge might honestly have regarded them as solid? Has it not been conceded, by the omission to prosecute judge Griffin for his decision, that his error, if he committed one, was an honest error? When this distinction between this respondent and his colleague? And why is that opinion imputed to one as a crime, which in the other is considered as innocent?"

<sup>19</sup> "The indictment against James Thompson Callender, which has been already mentioned, and of which a copy is exhibited with this answer, consisted of two distinct and separate counts, each of which contained twenty distinct and independent charges, or sets of words. Each of those sets of words was charged as a libel against John Adams, as President of the United States—and the twelfth charge

As to Article 4 (1) the respondent insisted that it was most proper that a question propounded to a witness should be reduced to writing so that the Court's deliberation may

embraced the following words, 'He (meaning president Adams) was a professed aristocrat; he proved faithful and serviceable to the British interest.' The defense set up was confined to this charge, and was rested upon the truth of the words. To the other nineteen charges, no defense of any kind was attempted or spoken of, except such as might arise from the supposed unconstitutionality of the sedition law; which if solid, applied to the twelfth charge, as well as to the other nineteen. It was to prove the truth of these words, that John Taylor, the person mentioned in the articles of impeachment now under consideration, was offered as a witness. It can hardly be necessary to remind this honorable court, that when an indictment for a libel contains several distinct charges, founded on distinct sets of words, the party accused, who in such cases is called the 'traverser,' must be convicted, unless he makes a sufficient defense against every charge. His innocence on one, does not prove him innocent on the others. If the sedition law should be considered as unconstitutional, the whole indictment, including this twelfth charge, must fall to the ground, whether the words in question were proved to be true or not. If the law should be considered as constitutional, then the traverser, whether the words in the twelfth charge were proved to be true or not, must be convicted on the other nineteen charges, against which no defense was offered. This conviction on nineteen charges, would put the traverser as completely in the power of the court by which the amount of the fine and term of the imprisonment were to be fixed, as a conviction upon all the twenty charges. The imprisonment could not exceed two years, nor the fine be more than two thousand dollars. If then this respondent were desirous of procuring the conviction of the traverser, he was sure of his object, without rejecting the testimony of John Taylor. If his temper towards the traverser were so vindictive, as to make him feel anxious to obtain an opportunity and excuse for inflicting on him the whole extent of punishment permitted by the law, still a conviction on nineteen charges afforded this opportunity and excuse, as fully as a conviction on twenty charges. One slander, more or less, in such a publication as the 'Prospect Before Us,' could surely be of no moment. To attain this object, therefore, it was not necessary to reject the testimony of John Taylor.

"That the court did not feel this vindictive spirit, is clearly evinced by the moderation of the punishment, which actually was inflicted on the traverser, after he was convicted of the whole twenty charges. Instead of two thousand dollars, he was fined only two hundred, and was sentenced to only nine months imprisonment, instead of two years. And this respondent avers, that he never felt or expressed a wish to go further; but that in this decision, as well

be more perfect and its judgment more likely to be correct. He apologizes to the Senate for taking so much time in refuting a charge which has so little claim to serious consideration.<sup>20</sup>

As to Article 4 (2) the respondent pleaded that in his opinion sufficient grounds were not presented for the postponement of the trial.<sup>21</sup>

as in every other given in the course of the trial, he fully and freely concurred with his colleague, Judge Griffin.

"As a further proof that his rejection of this testimony did not proceed from any improper motive, but from a conviction in his mind that it was legally inadmissible and that it was, therefore his duty to reject it, he begs leave to state, that he interfered, in order to prevail on the district attorney to withdraw his objection to those questions, and consent to their being put; which that officer refused to do, on the ground 'that he did not feel himself at liberty to consent to such a departure from legal principles.'"

<sup>20</sup> "It being the right and duty of a court before which a trial takes place, to inform itself of the nature of the evidence offered, so as to be able to judge whether such evidence be proper, it results necessarily that they have a right to require, that any question intended to be put to a witness, should be reduced to writing; for that is the form in which their deliberation upon it may be most perfect, and their judgment will be most likely to be correct. In the case now under consideration, the court did exercise this right. When the testimony of John Taylor was offered, the court enquired of the traverser's counsel, what that witness was to prove. The statement of his testimony given in answer, induced the court to suspect that it was irrelevant and inadmissible. They therefore, that they might have an opportunity for more careful and accurate consideration, called upon the counsel to state in writing, the questions intended to be put to the witness. This is the act done by the court, but concurred in by the respondent, which has been selected and adduced, as one of the proofs and instances of 'manifest injustice, partiality, and intemperance' on his part. He owes an apology to this honorable court, for having occupied so much of its time with the refutation of a charge which has no claim to serious consideration, except what it derives from the respect due to the honorable body by which it was made and the high character of the court where it is preferred."

<sup>21</sup> "One of the legal grounds, and the principle one on which such a continuance may be granted, is the absence of competent and material witnesses, whom the party cannot produce at the present term, but has a reasonable ground for expecting to be able to produce at the next term. Analogous to this, is the inability to

As to Article 4 (3) the respondent can only make a general denial, for a charge so vague as this does not admit of a precise or particular refutation. It was his intention and

procure at the present term, legal and material written testimony, which the party has a reasonable expectation of being able to procure at the next term.

"These rules are as reasonable and just in themselves, as they are essential to the due administration of justice, to the punishment of offenses on the one hand, and to the protection of innocence on the other. If the continuance of a cause, on the application of the party accused, were a matter of right, it is manifest that no indictment would be brought to trial until after a delay of many months. If, on the other hand, the granting of a continuance depended not on fixed rules, but on the arbitrary will of the court, it would follow that weakness or partiality might induce a court, on some occasions, to extend a very improper indulgence to the party accused; while on others, passion or prejudice might deprive him of the necessary means of making his defense. Hence the necessity of fixed rules, which the judges are bound to expound and apply, under the solemn sanction of their oath of office.

"The true and only reason for granting a continuance is, that the party accused may have the best opportunity that the law can afford to him, of making his defense. But incompetent or immaterial witnesses, could not be examined if they were present; and consequently, their absence can deprive the party of no opportunity which the laws afford to him, of making his defense. Hence the rule, that the witnesses must be competent and material.

"Public justice will not permit the trial of offenders to be delayed, on light or unfounded pretenses. To wait for testimony, which the party really wished for, but did not expect to be able to produce within some definite period, would certainly be a very light pretense; and to make him the judge, how far there was reasonable expectation of obtaining the testimony within the proper time, would put it in his power to delay the trial, on the most unfounded pretenses. Hence the rule, that there must be reasonable ground of expectation, in the judgment of the court, that the testimony may be obtained within the proper time.

"It is therefore a settled and most necessary rule, that every application for a continuance, on the ground of obtaining testimony, must be supported by an affidavit, disclosing a sufficient matter to satisfy the court, that the testimony wanted 'is competent and material,' and that there is 'reasonable expectation of procuring it within the time prescribed.' From a comparison of the affidavit in question with the indictment, it will soon appear how far the traverser in this case, brought himself within this rule.

"But the testimony of these witnesses, as stated in the affidavit, was wholly immaterial; and therefore, their absence was no ground

wish to treat counsel with respect and he insists that he was never intentionally rude or contemptuous in his conduct or expression towards them.<sup>22</sup>

As to Article 4 (4) the respondent makes the same answer. He never interrupted counsel vexatiously or except when he considered it his duty to do so.<sup>22a</sup>

for a continuance, had there been reasonable ground for expecting their attendance at the next term."

<sup>22</sup> "A charge so vague, admits not of precise or particular refutation. He denies that there was any thing unusual or intentionally rude or contemptuous in his conduct or his expressions towards the prisoner's counsel; that he made any false insinuation whatever against them, or that his own conduct tended in any manner to produce insubordination to law. On the contrary, it was his wish and intention, to treat the counsel with the respect due to their situation and functions, and with the decorum due to his own character. He thought it his duty to restrain such of their attempts as he considered improper, and to overrule motions made by them, which he considered as unfounded in law; but this it was his wish to accomplish in the manner least likely to offend, from which every consideration concurred in dissuading him. He did indeed think at that time, and still remains under the impression, that the conduct of the traverser's counsel, whether from intention or not he will not undertake to say, was disrespectful, irritating, and highly incorrect. That conduct which he viewed in this light, might have produced some irritation in a temper naturally quick and warm, and that this irritation might, notwithstanding his end favors to suppress it, have appeared in his manner and in his expression, he thinks not improbable; for he has had occasions of feeling and lamenting the want of sufficient caution and self-command, in things of this nature. But he confidently affirms, that his conduct in this particular was free from intentional impropriety; and this respondent denies, that any part of his conduct was such as ought to have induced the traverser's counsel to 'abandon the cause of their client,' nor does he believe that any such cause did induce them to take that step. On the contrary, he believes that it was taken by them under the influence of passion or for some motive into which this respondent forbears at this time to inquire. And this respondent admits, that the said traverser was convicted and condemned to fine and imprisonment, but not by reason of the abandonment of his counsel; but because the charges against him were clearly proved, and no defense was made or attempted against far the greater number of them.

<sup>22a</sup> "To this charge also, it is impossible to give any other answer but a general denial. He avers that he never interrupted the traverser's counsel vexatiously or except when he considered it his duty

As to Article 4 (5) this is another charge of which it is impossible to give a specific refutation. He denies that he felt any solicitude for the conviction of the accused other than that which every friend of truth, decorum and virtue has, that persons guilty of such offenses should be punished for the sake of example. He does not hesitate to acknowledge that his indignation was excited by the atrocious libels which the prisoner was charged with having published and this he believes was shared by every honorable man who had read the book in question.<sup>23</sup>

to do so. It cannot be denied that courts have power to interrupt counsel, when in their opinion, the correctness of proceedings requires it. In this, as in everything else, they may err. They may sometimes act under the influence of momentary passion or irritation, to which they in common with other men, are liable. But unless their conduct in such cases, though improper or ill-judged, be clearly shown to proceed, not from human infirmity, but from improper motives, it cannot be imputed to them as an offense, much less as a crime or misdemeanor.

<sup>23</sup> "This is another charge of which it is impossible to give a precise refutation and to a general denial of which, this respondent must therefore confine himself. He denies that he felt any solicitude whatever for the conviction of the traverser; other than the general wish natural to every friend of truth, decorum and virtue, that persons guilty of such offenses, as that of which the traverser stood indicted, should be brought to punishment, for the sake of example. He has no hesitation to acknowledge that his indignation was strongly excited, by the atrocious and profligate libel which the traverser was charged with having written and published. This indignation, he believes, was felt by every virtuous and honorable man in the community of every party, who had read the book in question, or become acquainted with its contents. How properly it was felt, will appear from the book itself, which this respondent has ready to produce to this honorable court; from the part of it incorporated into the indictment now under consideration; and from some further extracts contained in the paper marked exhibit No. 6, which this respondent prays leave to make part of this his answer. He admits, and it can never be to him a subject of self-reproach or a cause of regret that he partook largely in this general indignation, but he denies that it in any manner influenced his conduct towards the traverser, which was regulated by a conscientious regard to his duty and the laws. He moreover contends that a solicitude to procure the conviction of the traverser, however unbecoming his character as a judge, would not have been an offense, had he felt it; unless it had given rise to some misconduct

As to Article 5, the respondent pleaded that he simply followed the construction of the law adopted by the courts of Virginia and their general practice and that a local Virginia statute was not known to him or the prisoner's counsel at that time.<sup>24</sup>

on his part. Intentions and feelings, unless accompanied by actions, do not constitute crimes in this country; where the guilt or innocence of men is not judged of by their wishes and solicitudes, but by their conduct and its motives. And this respondent thinks it his duty, on this occasion, to enter his solemn protest against the introduction in this country of those arbitrary principles, at once the offspring and the instruments of despotism, which would make 'high crimes and misdemeanors' to consist in 'rude and contemptuous expressions' in 'vexatious interruptions of counsel' and in the manifestation of 'indecent solicitude' for the conviction of a most notorious offender. Such conduct is no doubt improper and unbecoming in any person, and much more so in a judge; but it is too vague, too uncertain, and too susceptible of forced interpretations, according to the impulse of passion or the views of policy, to be admitted into the class of punishable offenses, under a system of law whose certainty and precision in the definition of crimes, is its greatest glory, and the greatest privilege of those who live under its sway."

<sup>24</sup> "This respondent, in ordering a *capias* to issue against Callender, decided correctly, as it certainly was his intention to do. But he claims no other merit than that of upright intention in this decision; for when he made the decision, he was utterly ignorant that such a law existed in Virginia; and declares that he never heard of it, till this article was reported by a committee of the House of Representatives, during the present session of Congress. This law was not mentioned on the trial either by the counsel or the traverser, or by Judge Griffin, who certainly had much better opportunities of knowing it than this respondent, and who, no doubt, would have cited it had they known it and considered it as applicable to the case. This respondent well knows that in a criminal view, ignorance of the law excuses no man in offending against it—but this maxim applies not to the decision of a judge, in whom ignorance of the law in general would certainly be a disqualification for this office, though not a crime; but ignorance of a particular act of assembly, of a state where he was an utter stranger, must be considered as a very pardonable error; especially as the counsel for the prisoner to whose case that law is supposed to have applied, forbore or omitted to cite it; and as a judge of the state, always resident in it, and long conversant with its local laws, either forgot this law or considered it as inapplicable.

"Such is the answer which this respondent makes to the fifth ar-

As to Article 6, he pleaded that he did not construe the laws of the United States and of Virginia as requiring him to allow a continuance of the trial to the next term of court; if he was mistaken it was an honest error and such an error of construction or his ignorance of a local statute of which the prisoner's counsel was equally ignorant cannot be construed as an offense meriting punishment.<sup>25</sup>

ticle of impeachment. If he erred in this case, it was through ignorance of the law, and surely, ignorance under such circumstances, cannot be a crime, much less a high crime and misdemeanor, for which he ought to be removed from his office. If a judge were impeachable for acting against law from ignorance only, it would follow that he would be punished in the same manner for deciding against law wilfully and for deciding against it through mistake. In other words, there would be no distinction between ignorance and design, between error and corruption."

<sup>25</sup> "In answer to this charge this respondent declares that he was at the time of making the above-mentioned decision, wholly ignorant of any such law of Virginia as that in question, that no such law was adduced or mentioned by the counsel of Callender, in support of their motion for a continuance; neither when they first made it, before this respondent sitting alone; nor when they renewed it, after Judge Griffin had taken his seat in court; that no such law was mentioned by Judge Griffin, who concurred in overruling the motion for a continuance and ordering on the trial; which he could not have done had he known that such a law existed, or considered it as applicable to the case; and that this respondent never heard of any such law, until the articles of impeachment now under consideration were reported in the course of the present session of Congress, by a committee of the House of Representatives.

"A judge is certainly bound to use all proper and reasonable means of obtaining a knowledge of the laws which he is appointed to administer; but after the use of such means, to overlook, misunderstanding, or remain ignorant of some particular law, is at all times a very pardonable error. It is much more so in the case of a judge of the Supreme Court of the United States, holding a circuit court in a particular state, with which he is a stranger, and with the local laws of which he can have enjoyed but very imperfect opportunities of becoming acquainted. It was foreseen by Congress, in establishing the circuit courts of the United States, that difficulties and inconveniences must frequently arise from this source, and to obviate such difficulties it was provided, that the district judge of each state, who having been a resident of the state and a practitioner in its courts, had all the necessary means of becoming acquainted with its local laws, should form a part of the



As to Article 7, which was that the respondent refused to discharge a Grand Jury at their request; that he directed their attention to an offense against a Federal statute and that he asked the district attorney to aid the jury in their inquiries concerning it, *Judge Chase* answered that as to his refusal to discharge the Grand Jury it was the every day practice of a judge, and he was bound to do so whenever he thought that the due administration of justice required their longer attendance, and as to the other matters he acted according to his sense of what the duties of his office required.<sup>26</sup>

circuit court in his own state. The judge of the Supreme Court is expected, with reason, to be well versed in the general laws; but the local laws of the state form the peculiar province of the district judge, who may be justly considered as particularly responsible for their due observance. If in the case in question, this respondent overlooked or misconstrued any local law of the State of Virginia, which ought to have governed the case, it was equally overlooked and misunderstood, not only by the prisoner's counsel who made the motion, and whose peculiar duty it was to know the law and bring it into the view of the court, but also by the district judge, who had the best opportunities of knowing and understanding it, and in whom, nevertheless, this oversight or mistake is considered as a venal error, while in this respondent it is made the ground of a criminal charge.

"This respondent further states, that after the most diligent and the most extensive inquiry which the time allowed for preparing this answer would permit, he can find no law of Virginia which expressly enacts, 'in cases not capital, the offender shall not be held to answer any presentment of a Grand Jury, until the court next succeeding that during which such presentment shall have been made.' This principle he supposes to be an inference drawn by the authors of the articles of impeachment, from the law of Virginia mentioned in the answer to the preceding article, the law of November 15th, 1792.

"If in these opinions this respondent be incorrect, it is an honest error. And he contends that neither such an error in the construction of a law, nor his ignorance of a local state law which he had no opportunity of knowing, and of which the counsel for the party whose case it is supposed to have affected were equally ignorant, can be considered as an offense liable to impeachment, or to any sort of punishment or blame."

<sup>26</sup> "On the same day before the usual hour of adjournment, the Grand Jury came into court, and informed the court that they had found no indictment or presentment, and had no business before them, for which reason they wished to be discharged. This re-

As to Article 8, which was that he had delivered to the Grand Jury an intemperate and inflammatory political ha-

spondent replied that it was earlier than the usual hour of discharging a Grand Jury; and that business might occur during the sitting of the court. He also asked them if they had no information of publications within the district, that came under the sedition law, and added, that he had been informed that there was a paper called the 'Mirror,' published at Wilmington, which contained libellous charges against the government and President of the United States: that he had not seen that paper, but it was their duty to inquire into the subject. And if they had not turned their attention to it, the attorney for the district would be pleased to examine a file of that paper, 'and if he found anything that came within the sedition law, would lay it before them.' This is the substance of what the respondent said to the jury on that occasion, and he believes nearly his words on the morning of the next day they came into court and declared they had no presentments or indictments to make, on which they were immediately discharged. The whole time therefore, for which they were detained was twenty-four hours, far less than is generally required of grand juries.

"In these proceedings, this respondent acted according to his sense of what the duties of his office required. It certainly was his duty to give in charge to the Grand Jury all such statutes of the United States as provided for the punishment of offenses, and, among others, that called the sedition act; into all offenses against which act, while it continued in force, the Grand Jury were bound by their oaths to inquire. In giving it in charge, together with the other acts of Congress for the punishment of offenses, he followed moreover the example of the other judges of the Supreme Court, in holding their respective circuit courts. He also contends, and did then believe, that it was his duty, when informed of an offense, which the Grand Jury had overlooked, to direct their attention towards it, and to request for them, and even to require if necessary, the aid of the District Attorney in making their inquiries. In thus discharging what he conceives to be his duty, even if he committed an error in so considering it, he denies that he committed or could commit any offense whatever.

"With respect to the remarks which he is charged by this article with having made to the Grand Jury, relative to 'a highly seditious temper, which he had understood to have manifested itself in the State of Delaware among a certain class of people, particularly in Newcastle county, and more especially in the town of Wilmington,' and relative to 'a most seditious printer residing in Wilmington, unrestrained by any principle of virtue and regardless of social order;' this respondent does not recollect or believe, that he made any such observations. But if he did make them, it could not be improper in him to tell the jury that he had received such information, if in fact he had received it; which was probably the case, though he cannot

be more perfect and its judgment more likely to be correct. He apologizes to the Senate for taking so much time in refuting a charge which has so little claim to serious consideration.<sup>20</sup>

As to Article 4 (2) the respondent pleaded that in his opinion sufficient grounds were not presented for the postponement of the trial.<sup>21</sup>

as in every other given in the course of the trial, he fully and freely concurred with his colleague, Judge Griffin.

"As a further proof that his rejection of this testimony did not proceed from any improper motive, but from a conviction in his mind that it was legally inadmissible and that it was, therefore his duty to reject it, he begs leave to state, that he interfered, in order to prevail on the district attorney to withdraw his objection to those questions, and consent to their being put; which that officer refused to do, on the ground 'that he did not feel himself at liberty to consent to such a departure from legal principles.'"

<sup>20</sup> "It being the right and duty of a court before which a trial takes place, to inform itself of the nature of the evidence offered, so as to be able to judge whether such evidence be proper, it results necessarily that they have a right to require, that any question intended to be put to a witness, should be reduced to writing; for that is the form in which their deliberation upon it may be most perfect, and their judgment will be most likely to be correct. In the case now under consideration, the court did exercise this right. When the testimony of John Taylor was offered, the court enquired of the traverser's counsel, what that witness was to prove. The statement of his testimony given in answer, induced the court to suspect that it was irrelevant and inadmissible. They therefore, that they might have an opportunity for more careful and accurate consideration, called upon the counsel to state in writing, the questions intended to be put to the witness. This is the act done by the court, but concurred in by the respondent, which has been selected and adduced, as one of the proofs and instances of 'manifest injustice, partiality, and intemperance' on his part. He owes an apology to this honorable court, for having occupied so much of its time with the refutation of a charge which has no claim to serious consideration, except what it derives from the respect due to the honorable body by which it was made and the high character of the court where it is preferred."

<sup>21</sup> "One of the legal grounds, and the principle one on which such a continuance may be granted, is the absence of competent and material witnesses, whom the party cannot produce at the present term, but has a reasonable ground for expecting to be able to produce at the next term. Analagous to this, is the inability to

As to Article 4 (3) the respondent can only make a general denial, for a charge so vague as this does not admit of a precise or particular refutation. It was his intention and

procure at the present term, legal and material written testimony, which the party has a reasonable expectation of being able to procure at the next term.

"These rules are as reasonable and just in themselves, as they are essential to the due administration of justice, to the punishment of offenses on the one hand, and to the protection of innocence on the other. If the continuance of a cause, on the application of the party accused, were a matter of right, it is manifest that no indictment would be brought to trial until after a delay of many months. If, on the other hand, the granting of a continuance depended not on fixed rules, but on the arbitrary will of the court, it would follow that weakness or partiality might induce a court, on some occasions, to extend a very improper indulgence to the party accused; while on others, passion or prejudice might deprive him of the necessary means of making his defense. Hence the necessity of fixed rules, which the judges are bound to expound and apply, under the solemn sanction of their oath of office.

"The true and only reason for granting a continuance is, that the party accused may have the best opportunity that the law can afford to him, of making his defense. But incompetent or immaterial witnesses, could not be examined if they were present; and consequently, their absence can deprive the party of no opportunity which the laws afford to him, of making his defense. Hence the rule, that the witnesses must be competent and material.

"Public justice will not permit the trial of offenders to be delayed, on light or unfounded pretenses. To wait for testimony, which the party really wished for, but did not expect to be able to produce within some definite period, would certainly be a very light pretense; and to make him the judge, how far there was reasonable expectation of obtaining the testimony within the proper time, would put it in his power to delay the trial, on the most unfounded pretenses. Hence the rule, that there must be reasonable ground of expectation, in the judgment of the court, that the testimony may be obtained within the proper time.

"It is therefore a settled and most necessary rule, that every application for a continuance, on the ground of obtaining testimony, must be supported by an affidavit, disclosing a sufficient matter to satisfy the court, that the testimony wanted 'is competent and material,' and that there is 'reasonable expectation of procuring it within the time prescribed.' From a comparison of the affidavit in question with the indictment, it will soon appear how far the traverser in this case, brought himself within this rule.

"But the testimony of these witnesses, as stated in the affidavit, was wholly immaterial; and therefore, their absence was no ground

*Mr. Randolph* read his replication to the answer.<sup>29</sup>

MR. RANDOLPH'S OPENING SPEECH

*February 9.*

*Mr. Randolph:* Mr. President. It becomes my duty to open the case on the part of the prosecution. From this duty, how-

"Nor can the incorrectness of the political opinions thus expressed have any influence in deciding on the guilt or innocence of a judge's conduct in expressing them. For if he should be considered as guilty or innocent, according to the supposed correctness or incorrectness of the opinion, thus expressed by him, it would follow that error in political opinion however honestly entertained, might be a crime; and that a party in power might, under this pretext, destroy any judge who might happen in a charge to a Grand Jury, to say something capable of being construed by them into a political opinion adverse to their own system.

"There might be some pretense for saying that for a judge to utter seditious sentiments, with intent to excite sedition, would be an impeachable offense, although such a doctrine would be liable to the most dangerous abuses; and is hostile to the fundamental principles of our constitution, and to the best established maxims of our criminal jurisprudence. But admitting this doctrine to be correct, it cannot be denied that the seditious intention must be proved clearly either by the most necessary implication from the words themselves, or by some overt acts of a seditious nature connected with them. In the present case no such acts are alleged, but the proof of a seditious intent must rest on the words themselves. By this rule this respondent is willing to be judged. Let the opinions which he delivered be examined; and if the members of this honorable court can lay their hands on their hearts, in the presence of God, and say, that these opinions are not only erroneous but seditious also; and carry with them internal evidence of an intention in this respondent to excite sedition, either against the state or general government, he is content to be found guilty.

"In making this examination, let it be borne in mind that to oppose a depending measure by endeavoring to convince the public that it is improper, and ought not to be adopted; or to promote the repeal of a law already past, by endeavoring to convince the public that it ought to be repealed, and that such men ought to be elected to the legislature as will repeal it, to attempt in fine, the correction of public measures by argument tending to show their improper nature, or destructive tendency; never has been or can be considered as sedition, in any country where the principles of law and liberty are respected; but it is the proper and usual exercise of that right of opinion and speech, which constitute the distinguishing

ever inadequate I might be at any time to discharge it, and especially at the present, both on account of the shortness of time which we have had to answer the lengthy reply of the respondent, and of personal indisposition, I shall not shrink.

feature of free government. The abuse of this privilege by writing and publishing as facts, malicious falsehoods, with intent to defame is punishable as libellous in the courts having jurisdiction of such offenses; where the truth or falsehood of the facts alleged, and the malice or correctness of the intention, form the criterion of guilt and innocence. But the character of libellous, much less of seditious, has never been applied to the expression of opinions concerning the tendency of public measures, or to arguments urged for the purpose of opposing them, or of effecting their repeal. To apply the doctrine of sedition or of libels to such cases, would instantly destroy all liberty of speech, subvert the main pillars of free government, and convert the tribunals of justice into engines of party vengeance. To condemn a public measure, therefore, as pernicious in its tendency; to use arguments for proving it to be so; and to endeavor, by these means to prevent its adoption, if still depending, or to procure its repeal in a regular and constitutional way, if it be already adopted, can never be considered as sedition or in any way illegal.

"The first opinion expressed to the Grand Jury on the occasion in question, by this respondent, was, that 'the late alteration of the federal judiciary, by the abolition of the office of the sixteen circuit judges; and the recent change in our state constitution, by establishing universal suffrage; and the further alteration that was then contemplated in our state judiciary, if adopted;' would, in the judgment of this respondent, 'take away all security for property and personal liberty.' That is, 'these three measures, if the last of them, which is still depending, should be adopted, will, in my opinion, form a system whose pernicious tendency must be, to take away the security for our property and our personal liberty,' which we have hitherto derived from the salutary restrictions, 'laid by the authors of our constitution on the right of suffrage, and from the present constitution of our courts of justice.' What is this but an argument to persuade the people of Maryland to reject the alterations in their state judiciary which were then proposed; which this respondent as a citizen of that state, had a right to oppose; and the adoption of which depended on a legislature then to be chosen? If this be sedition, then will it be impossible to express an opinion opposite to the views of the ruling party of the moment, or to oppose any of their measures by argument, without becoming subject to such punishment as they may think proper to inflict.

"The next opinion is, that 'the independence of the national judiciary was already shaken to its foundation, and that the virtue of

When I speak of the shortness of the time allowed us to reply to the answer of the respondent, I hope I shall not be understood as casting any imputation upon this honorable court, for expressing a wish that the trial may be postponed. Sen-

the people alone could restore it.' In other words, 'The act of Congress for repealing the late circuit court law, and vacating thereby the offices of the judges, has shaken to its foundation the independence of the national judiciary, and nothing but a change in the representation of Congress, which the return of the people to correct sentiments can effect, will be sufficient to produce a repeal of this act, and thereby restore to its former vigor, the part of the federal constitution which has been thus impaired.

"This is the obvious meaning of the expression, and it amounts to nothing more than an argument in favor of that change which this respondent then thought and still thinks to be very desirable; an argument, the force of which as a patriot he might feel, and which as a free man he had a right to advance.

"The next opinion is, that 'the independence of the judges of the State of Maryland would be entirely destroyed if the bill for abolishing the two supreme courts should be ratified by the next general assembly.' This opinion, however incorrect it may be, seems to have been adopted by the people of Maryland, to whom this argument against the bill in question was addressed; for at the next session of the legislature this bill which went to change entirely the constitutional tenure of judicial office in the state, and to render the subsistence of the judges dependent on the legislature, and their continuance in office on the executive, was abandoned by common consent.

"All the other opinions expressed by this respondent, as above mentioned, bear the same character with those already considered. They are arguments addressed to the people of Maryland for the purpose of dissuading them from the adoption of a measure then depending; and of inducing them, if possible, to restore to its original state, that part of their constitution relating to the right of suffrage, by a repeal of the law, which had been made for its alteration.

"Such were the objects of this respondent in delivering those opinions and he contends that they were fair, proper and legal objects, and that he had a right to pursue them in this way. A right sanctioned by the universal practice of this country, and by the acquiescence of its various legislative authorities. Such he contends is the true and obvious meaning of the opinions which he delivered, and which he believes to be correct. It is not now necessary to inquire into their correctness; but, if incorrect, he denies that they contain anything seditious, or any evidence of those improper intentions which are imputed to him by this article of impeachment. He denies that in delivering them to the Grand Jury, he committed

sible I am, that this court would allow us longer time, but a desire for the furtherance of justice, added to the impregnable ground on which the Managers stand, induce them to be ready on the part of the prosecution.

The Managers are in this instance to establish the guilt of

any offense, infringed any law, or did anything unusual, or heretofore considered in this country as improper or unbecoming in a judge. If this article of impeachment can be sustained on these grounds, the liberty of speech on national concerns, and the tenure of the judicial office under the government of the United States, must hereafter depend on the arbitrary will of the House of Representatives and the Senate, to be declared on impeachment, after the acts are done, which it may at any time be thought necessary to treat as high crimes and misdemeanors."

<sup>28</sup> "This respondent has now laid before this honorable court, as well as the time allowed him would permit, all the circumstances of this case. With an humble trust in Providence and a consciousness that he hath discharged all his official duties with justice and impartiality, to the best of his knowledge and abilities; and that intentionally he hath committed no crimes or misdemeanors, or any violation of the constitution or laws of his country. Confiding in the impartiality, independence and integrity of his judges, and that they will patiently hear and conscientiously determine this case, without being influenced by the spirit of party, by popular prejudice or political motives, he cheerfully submits himself to their decision.

"If it shall appear to this honorable court from the evidence produced that he hath acted in his judicial character with wilful injustice or partiality, he doth not wish any favor, but expects that the whole extent of the punishment permitted in the constitution will be inflicted upon him.

"If any part of his official conduct shall appear to this honorable court, *stricti juris*, to have been illegal, or to have proceeded from ignorance or error in judgment; or if any part of his conduct shall appear, although illegal, to have been irregular or improper, but not to have flowed from a depravity of heart, or any unworthy motives, he feels confident that this court will make allowance for the imperfections and frailties incident to man. He is satisfied that every member of this tribunal will observe the principles of humanity and justice, will presume him innocent until his guilt shall be established by legal and credible witnesses; and will be governed in his decision, by the moral and Christian rule of rendering that justice to this respondent which he would wish to receive.

"This respondent now stands not merely before an earthly tribunal, but also before that awful Being, whose presence fills all



one of the judges of the Supreme Court—of a man capable of being one of the ornaments of his country—and who, if he had made a proper use of his talents, would have done as much good for his country as he has inflicted wounds upon it by his misconduct. The arraignment of a man of such talents before this tribunal, is one of the saddest spectacles ever presented to the view of any people. Base indeed must be his heart who could triumph over such a scene.

space, and whose all seeing eye more especially surveys the temples of justice and religion. In a little time, his accusers, his judges and himself must appear at the Bar of Omnipotence, where the secrets of all hearts shall be disclosed and every human being shall answer for his deeds done in the body, and shall be compelled to give evidence against himself in the presence of assembled universe. To his omniscient judge, at that awful hour, he now appeals for the rectitude and purity of his conduct as to all the matters of which he is this day accused.

“He has now only to adjure each member of this honorable court by the living God, and in his holy name, to render impartial justice to him, according to the constitution and laws of the United States. He makes this solemn demand of each member, by all his hopes of happiness in the world to come, which he will have voluntarily renounced by the oath he has taken; if he shall wilfully do this respondent injustice, or disregard the constitution or laws of the United States, which he has solemnly sworn to make the rule and standard of his judgment and decision.”

<sup>29</sup> “That the said Samuel Chase hath endeavored to cover the high crimes and misdemeanors laid to his charge by evasive insinuations and misrepresentation of facts; that the said answer does give a gloss and coloring utterly false and untrue to the various criminal matters contained in the said articles; that the said Samuel Chase did, in fact, commit the numerous acts of oppression, persecution and injustice of which he stands accused; and the House of Representatives, in full confidence of the truth and justice of their accusation, and of the necessity of bringing the said Samuel Chase to a speedy and exemplary punishment, and not doubting that the Senate will use all becoming diligence to do justice to the proceedings of the House of Representatives and to vindicate the honor of the nation, do aver their charges against the said Samuel Chase to be true, and that the said Samuel Chase is guilty in such manner as he stands impeached; and that the House of Representatives will be ready to prove their charges against him, at such convenient time and place as shall be appointed for that purpose.”

The first charge with which the respondent is impeached, is relative to his conduct upon the trial of John Fries for treason.

(*Mr. Randolph* read the first article of impeachment.)

The answer of the respondent to this charge is by evasive insinuations and misrepresentations of facts. He attempts to show that the opinion which he delivered in the case of Fries, upon the law, was the law laid down by his predecessors, in the same court, and once upon the same case. This is an attempt to wrest the charge from the true point on which it stands, and to place it upon another. It is not on account of the illegality of the opinion which the respondent gave that he is impeached, but for the time when he delivered it, and the motives by which he was governed. The charge against him is, that he delivered an opinion in writing, tending to prejudice the minds of the jury against John Fries the prisoner, before the case had been argued by the counsel. If the managers were to be governed by their own sense of propriety, and not by their duty to those by whom they are employed, they might with safety, in my opinion, rest the case upon the concessions of the respondent himself. The respondent acknowledges in his answer, that he did deliver an opinion on the law, tending to prejudice the minds of the jury against John Fries, the prisoner, before the counsel had been heard in his defense. This may be seen by a reference to the answer of the respondent, a part of which I must beg the favor of one of those associated with me to read.

(*Mr. Clark* here read a passage of the answer.)

Our object is to prove that the opinion was delivered with an intention to prejudice the minds of the jury against the prisoner—and that the respondent did restrict the counsel in their attempt to cite English authorities which they considered opposite, and also the statutes of the United States and did debar them of their constitutional privilege to address the jury upon the law as well as the fact. These are facts which we are able to prove by the most respectable evidence. But

the respondent assigns as a reason for his delivering his opinion on the law at the time he did, that the law had been settled by his predecessors. What does this prove? That the respondent endeavored to wrest from the counsel privileges which none of his predecessors conceived themselves authorized to do, to wit, that of addressing the jury on the law as well as the fact. If as the respondent states, the law was settled twice, after solemn argument, it is an evidence that his predecessors never attempted to debar the counsel from arguing before the jury as to the law. The learned judges who decide the law in those cases, and to whom the respondent has appealed as authority, delivered their opinions posterior to the argument by the counsel and not anterior like the respondent. I repeat again, that it is not for the giving the opinion, that the respondent is charged, but for the manner of giving it. It is for having a copy of a written opinion made out for the jury, previous to their hearing argument, and thereby prejudicing their minds against the prisoner. The respondent has also admitted that the counsel for Fries had rested their case altogether upon the law, conscious that the facts could be proven. For this reason they ought not to have been controlled in their defense. If they believed that the law was in favor of the prisoner, they had a right to address the jury upon that as well as upon the facts, and in debarring them from it, the respondent wrested from the prisoner a constitutional right, that of being heard by counsel. I must be allowed to take what I conceive to be a strong distinction—that there is a material difference between judges' giving a naked definition of the crime of high treason, and an opinion upon certain overt acts charged in an indictment and applied to the particular case before him. The Managers do not deny—counsel for Fries did not deny the right of the respondent to deliver his opinion to the jury upon the law respecting high treason, but the difference which I have taken appears evident, and the respondent had no right to deliver a written opinion to the jury concerning the particular case, and before solemn argument by counsel.

To illustrate this point permit me to state a similar case.

It will not be pretended that the crime of high treason is better defined, than the crime of murder. The latter is defined to be a killing with malice prepense. But although the definition is so well known was there ever a judge before the respondent daring enough to tell the jury that the overt acts charged in the indictment, if proved, amounted to murder, and that they must find the prisoner guilty; I believe not. There is a very wide distinction between the conduct of a judge who delivers an opinion to the jury upon the law, after solemn argument, and that of the respondent who prejudged the case. I believe there never has been an instance where counsel have been stopped by the court, where they attempted to prove to the jury that the facts which the prisoner had committed did not amount to murder. The conduct of the respondent in preventing the counsel from addressing the jury upon the law, and delivering a written opinion, before argument, was entirely novel to the usages of our country. The respondent aware that the Managers were prepared to prove what is charged against him, has in his answer admitted a part of the charge, but a part of it he has denied. This we are prepared to prove by the most respectable testimony. We are prepared to prove that the respondent debarred the prisoner of his constitutional right of addressing the jury by his counsel upon the law. This the respondent has in a manner admitted in his answer, for he says that he informed the counsel for Fries that if they conceived that the court were wrong in their opinion as to the law they might address themselves to the court. What would be said if a judge in a case where a person was tried for murder, if he were to inform the counsel for the prisoner that they should not address the jury upon the law; that they should not attempt to prove to the jury that the facts committed, did not amount to murder; but that on that subject, they must address themselves to the court! He would be deservedly censured by every man, and would be considered as unworthy of sitting on the bench of justice—and yet the conduct of the respondent was not dissimilar to this. The jury has a right in all criminal cases to find a general verdict, and to judge of the law, and of

course had a right to hear arguments on it. The acts of Congress which the counsel for Fries intended to have read to the jury, went, in their opinion, to show that the crime which Fries had committed was less than treason, and made punishable by fine and imprisonment—and yet the same judge which delivered a prejudicated opinion, prevented these statutes, which were the law of the land, from being read. Not only were the counsel debarred from citing common authorities, and the decisions of courts of justice in another country, but even from the laws of the land: although they considered that they were material to the defense of the prisoner.

I must be again permitted to repeat, that it is not for the incorrectness of the opinion delivered by the respondent in the case of Fries, that he stands charged, but for the time when he delivered it, and his motives for doing it. The Managers will not undertake to examine the soundness of the opinion—they have nothing to do with that—but the manner of delivering it, was a departure from all precedents, and what I believe, is novel in all our courts of justice.

I will now proceed to the second article of impeachment. It is, that the respondent overruled the objection of John Bassett, who wished to be excused from serving as a juror on the trial of Callender, upon the ground that the opinion of the juror must have been delivered as well as formed and that upon the words charged in the indictment. In the ninth page of the answer of the respondent, it will be seen that a new trial was granted to Fries, upon the ground that one of the jurors after he had been summoned, but before he was sworn, had used expressions hostile to the prisoner. By recurring to the answer of the respondent, it will be found that the opinion which he gave in the trial of Fries, was dissimilar to the one held to be correct in the case of Callender. In the case of Fries the jury before they were sworn, were asked whether they had formed or delivered any opinion, hostile to the prisoner, or that he ought to be punished. The question was in the disjunctive, not whether he had formed and delivered an opinion, but whether he had formed or de-

livered an opinion. But in the case of Callender a different conduct was pursued, and a juror was not to be excused from serving unless he had delivered as well as formed an opinion; Basset could never have seen the indictment, and therefore, according to the opinion given by the respondent, could not be set aside, even although he had a personal and avowed enmity to the defendant. It was perfectly immaterial what Basset's opinion as to the guilt of the defendant was, because the only question which was suffered to be put to him was one that he was obliged to answer in the negative, to wit, whether he had formed and delivered an opinion upon an indictment which he could not have seen. The respondent has attempted to justify his conduct in this case, well knowing that the facts can all be proved, and contends that a juror's opinion must be formed and delivered upon the indictment, and not on the subject matter to be tried, to disqualify him from serving. In the case of Callender the subject matter to be tried was whether "The Prospect Before Us" was a libel. If the juror had formed an opinion upon the book which was the matter in issue, that it was libellous, and also opinions hostile to the author, he was not a proper person to pass judgment between the defendant and his country. If Mr. Basset had formed an opinion that the "Prospect Before Us" was a false, scandalous and malicious libel, and came under the provisions of the act called the sedition act, he was not a person to serve upon the jury. Upon the ground taken by the respondent a personal enemy of any defendant might be taken upon a jury and the defendant could not object to him, because he could not have formed and delivered an opinion upon an indictment which he had never seen. The third article of impeachment is for rejecting the testimony of John Taylor, whom Callender believed to be a material witness, upon the ground that he could not prove all the charges in the indictment. Had this been the case, and John Taylor could only have proved a part of the charges, yet the conduct of the respondent must appear novel and unprecedented to every person. But at the time when the evidence of John Taylor was rejected, the respondent as well as the counsel for the

traverser, were ignorant of what he could prove. But it was rejected upon the ground that he was unable to prove all the charges in the indictment to be true. The charge extracted from "The Prospect Before Us!" a book which, with all its celebrity, I never saw until yesterday, was in these words (speaking of Mr. Adams) "He is a professed aristocrat; and has proved faithful and serviceable to the British interest." The charge was contained in two distinct sentences. The respondent says that taken separately, they meant nothing; taken together, they meant a great deal. Yet the evidence of John Taylor was refused, although he was expected to prove the whole charge, according to the meaning of the defendant when he wrote it. He was expected to prove that Mr. Adams had been useful to the British interest in the manner meant by the author of the "Prospect Before Us." I will ask this honorable court, whether it is proper for evidence to be rejected because incapable of proving all the facts in the case? May not a witness be material, although he can only establish a particular point? As if a fact were proven by one witness, would it be proper to admit testimony to strengthen that evidence although the person knew nothing of the facts. As, for instance, to prove that he saw the parties together on that day. Suppose two witnesses were adduced to prove facts, and neither could prove all, according to the decisions of the respondent neither could be admitted to give evidence. The respondent in his answer, says that the court have a right to compel counsel to reduce the questions which they meant to propound to their witness to writing, and that it has frequently been done. I do not intend to set up my judgment upon legal questions, in opposition to the respondent's—but I can say without hesitation that it is not the practice in the state in which the case was tried, nor has counsel in Virginia, either before, or since the case of Callender, been compelled to reduce to writing any questions which they wished to propound to their witnesses and to submit those questions to the inspection of the court. But the respondent has set up this curious defense. That he went with a determination to convict and punish Callender,

and therefore it was perfectly immaterial whether he could prove a part of the charges to be true or not, if he could not prove the whole, and if but one of the twenty charges could be fixed upon him, he would be perfectly in the power of the court. What was this but prejudging the case, and a determination of the respondent to procure the conviction of the defendant. But it was impossible for the court to know what John Taylor would prove. For aught they knew his evidence might have gone to the whole case, and produced from the jury a verdict of acquittal for the traverser. With respect to the counsel's having been compelled to reduce their questions to writing and submit them to the inspection of the court, it is believed by the Managers to be a course of procedure unusual in courts of justice. I recollect to have been present at the famous trial of Logwood, where the Chief Justice of the United States presided. It must be conceded that the United States were as much interested in the conviction of so notorious an offender as in that of any libeller whatever. Although evidence of the most questionable sort was brought forward on behalf of Logwood, nothing of that kind took place. The witnesses were all sworn in chief, and the weight of their testimony was left to the jury. The respondent also refused to postpone the trial of Callender, although an affidavit was filed stating the absence of material witnesses. The ground taken by the respondent in justification of this, is, that the witnesses lived in so dispersed a situation, that it would have been almost impossible to procure their attendance at the next court—this was a reason which ought to have operated forcibly in favor of a postponement of the trial, and goes to the conviction of the respondent. With regard to the rude and contemptuous expressions used by the respondent to the counsel for Callender, and the unusual manner in which he conducted himself, I will only refer the court to the testimony which will be offered in this case. But perhaps I shall be told that although such conduct is highly improper and unbecoming in a judge, yet it is not an indictable offense, and therefore not sufficient cause for a removal from office. In answer to this,



I will beg leave to observe that this is not a case to be determined according to common law, but by the common sense, and common opinion of the world upon it. I do not know whether it would be deemed an indictable offense for a judge to appear upon the bench of justice in a state of total intoxication and to use profane and obscene language, yet I presume it will not be denied that a judge convicted of these offenses can be removed by this honorable court.

The fifth article of impeachment, charges the respondent with having awarded a *capias* against the body of Callender, contrary to the law of Virginia, which was recognized by the act of Congress, passed in the year '89 for the establishment of the judicial system of the United States, as the rules of decision in the federal courts. The defense stated by the respondent, embraces two points—the one that the law of Virginia was passed posterior to the acts of Congress and therefore the latter could not have had reference to it; and it was not a rule of decision. It will be necessary to inform some of this court that the acts of Virginia had by the authority undergone an amendment and revision, and the acts thus revised were published under the title of the revised code of the laws of Virginia in the year 1792, of course, part of them bear date later than they were actually passed. The act in question did pass in the year '88, was anterior to the act of Congress; and being law at the time the latter passed, it became a rule of decision for the federal courts held in the State of Virginia.

(*Mr. Randolph* here read the law of Virginia.)

But the respondent states his ignorance of the law, and also that he did comply with it by issuing other proper process. We are prepared to prove that the other proper process mentioned in the law, has always been construed to mean a notice to the party charged to appear at the next court, and answer to the charges against him. But it has been said that this would be a notice to the party to abscond, and therefore avoid a punishment.

In cases not capital, it would be much better for a state, in my opinion, that the offender should go away into volun-

tary punishment than to punish him and suffer him to remain in the state. It has never been the practice of Virginia for an offense less than capital, to commit the offender to close custody. A *capias* has never been deemed the proper process—and that awarded against the body of Callender was not warranted by any law of Virginia, which was the rule of decision in that case. But the respondent says, that the counsel for the accused forbore to mention this law, and that he could not have been presumed to have known it. The counsel for the accused did cite this very act, not the section which relates to the point under consideration, but in support of their motion for a continuance of the trial, and of the right of the jury to assess the fine. They were told by the respondent that the court were not bound to notice that law, and that although it might be law in Virginia, when applied to their local regulations, but as applied to the courts of the United States, the construction was a wild one. Would it not then have been deemed folly in the extreme for the counsel for the accused to have brought the same act in order to support any other position which they might take. We are prepared to prove that unless this decision had been made by the court, that they were not bound to notice the law, that the law would have been cited.

But the respondent takes shelter under this doctrine, that the provisions of the act of Congress can relate only to state regulations, and not to the statutes of the United States, which he says are not cases at common law. We are prepared and I trust shall be able to show, that the words "trials at common law" were only used to contradistinguish them from the civil and maritime law.

I will pass over the seventh article and leave it upon the ground upon which it has been placed by the respondent in his answer.

On the eighth article I will observe, that the perversion of the bench of justice to the hustings of an election, was a thing totally variant from, and has no connection with, the right of speech which the respondent enjoys in his individual capacity. He has no right in his judicial capacity, to prevent

the bench of justice into the theatre of his political declamations. But we shall be told that in all those acts with which the respondent stands charged, that he was associated with other judges, who concurred in opinions with him, and were therefore equally guilty with the respondent.

The court will recollect the high standing which the respondent has with every person for his legal learning and abilities. This court will take all the acts together, and will observe, that in all of them, the respondent appeared to be the sole actor. With talents so conspicuous, and a disposition so irritable, he has been associated in the four several courts where he presided, and the acts for which he is impeached, were committed with men perhaps of timid minds, and with talents very far inferior to those of the respondent, that they were overawed by him, and were not culpable as the respondent. Wherever we behold the respondent sitting in his judicial capacity, we find the counsel extremely irritable and contumelious; and yet we behold the other judges of the United States holding courts in the same places, and associated with the same district judges as the respondent, and nothing of this kind appears. Contumacy is only found to exist in those courts where the respondent presides. Great distinction therefore exists between the respondent and these judges who have been upon the bench with him when these violations of law and justice took place.

There is a great distinction between a judge anxious for the punishment of men who have violated the laws, and a judge anxious for the punishment of those who violate a particular law. I could, if permitted, turn to a judge who has not been surpassed in this country as a terror to evil doers—an authority that differed with the respondent in his construction of the law relative to treason—a man second to none for his punishment of notorious offenders, for his regard to the laws and for his humanity. I will beg leave to read a passage from a work of his. (*Mr. Randolph* read a passage from *Tucker's Blackstone*.)

I have endeavored, Mr. President, in a manner very lame, to discharge the duty incumbent on me, and to show the

grounds on which we mean to rely for the conviction of the respondent. Such, however, is the case that it does not rest on so weak a ground as my arguments. I believe we shall be able to exhibit to this honorable court a tissue of judicial proceedings never before exhibited in the annals of our country. The respondent, in his answer, has appealed to the Supreme Searcher of hearts at the last day for the rectitude of his conduct. When such an appeal is made, I feel for the respondent, but I feel a great relief upon considering that the blood of John Fries, an innocent and oppressed man, will not rise in judgment against him. But for the timely extension of that provision of the constitution, which gives the president the power of granting pardon, the cries of the widow and the tears of the orphan would have cried aloud for justice against him at the throne of grace. And when at the last day all hearts were laid open, he would have been obliged to accuse himself, and to attest that in a manner novel and unprecedented, he had procured the conviction of a poor ignorant illiterate German, and sent him without remorse into eternity. But the then president of the United States has saved the respondent from answering for blood by granting a pardon to Fries, and by this act, obliterated the remembrance of a number of his errors from my mind, for mercy like charity, covereth a multitude of sins; and the pure ermine of justice was not suffered to be dyed with the blood of John Fries.

#### THE WITNESSES FOR THE PROSECUTION.

*William Lewis.* Mr. Dallas, Mr. Ewing and myself were counsel for Fries at his first trial. We were allowed to use every means necessary to acquit him. The trial was before Judges Iredell and Peters. He was convicted and a new trial was granted. This took place in April and May, 1799. At the next April term a new indictment was found. At this term Judge Chase presided and was assisted by Judge Peters.

Judge Chase observed that he had understood that at the former trial there had been a great waste of time by the counsel in making long speeches and in reading common law determinations relative to the doctrine of treason, and also English authorities both before and since their revolution, and also in reading several acts of Congress concerning offenses less than treason, particularly the act commonly called the sedition law. In order

to remedy this, that he or they (I do not recollect which) had made up an opinion on the law which he intended to deliver to the jury, and in order that the counsel on both sides might govern themselves accordingly, he or they had directed Clerk Caldwell to make out three copies, one of them to be delivered to the District Attorney, one to the counsel for the prisoner and a third to the jury. The clerk handed me the paper which was designed for the prisoner's counsel. I waved my hand and used these words: "I will never suffer my hand to be corrupted with a prejudged opinion in any case, much less so in a capital one." Judge Chase when speaking of the cases cited from the common law authorities and the statutes of England previous to the revolution, and also of the acts of Congress, said he would not suffer them to be read again. He said that the acts of Congress had no relation to the subject. He also said that they were the judges of the law and if they did not understand it they were unworthy of their seats there, and if the prisoner's counsel had anything to say, in order to show that they were wrong, they must address themselves to the court and not to the jury. I made some observations on the subject, but I cannot say with precision what they were. Mr. Dallas came into court. I briefly related what had passed and we were both impressed with the idea that as the court had made up their minds, it was not probable that they could be changed, and that it would be more serviceable to Fries that we should withdraw from his defense—this we told Fries and earnestly

recommended to him to agree to it. We told him that if he insisted on it we would proceed in his defense at every hazard and until we were stopped by the court, and should contend for our constitutional privileges, and address the jury on the law as well as on the fact. He said he knew we would do the best for him, and left it entirely with us to proceed or not with his defense. Informed him the court would probably offer to assign him other counsel, and desired him to refuse the offer; went to court the next day to inform the court I was no longer counsel for prisoner. Both Judge Chase and Judge Peters manifested a strong disposition that we should proceed with the defense and also to remove every restriction laid upon us the day before. Judge Chase told us to go on in our own way and address the jury upon the law as well as the fact, if we thought proper, but at the same time observed that it would be under the direction of the court and at our own peril, and at the risk of our characters, if we conducted ourselves with impropriety. Judge Peters observed that he knew the bar would take the stud, and asked if the court were in an error, would we not suffer it to be corrected. If they had fallen into an error I wished to keep them in it provided it would save the life of my client.

Said that it was the constitutional right of the prisoner to have counsel for his defense, and that it was the privilege of the counsel to address the jury upon the law as well as the fact in criminal cases, and that this was a right which would not be surrendered by the bar. Judge

Peters remarked that the papers were all withdrawn and destroyed. I answered that the court had said that they had made up their minds and had expressed it in the hearing of the jury which would be injurious to the prisoner, and that therefore I would not proceed in his defense. When Judge Chase said we should not read any decisions in England previous to their revolution, he said that we might read those that were made after it. We had not read the decisions at common law to show that the judges in this country were bound by them, but to show they ought to guard against constructive treason. Finding that we would not proceed in Fries' defense, Judge Chase observed that we should not be able to embarrass the court and that they would proceed without us, and by the blessing of God would render as much justice to the prisoner as if we had proceeded in his defense. The judges both on the second day took pains to induce us to proceed; we refused, believing after what had taken place, the life of our client would be saved sooner by his not having counsel, than by any exertion on our part.

In the first trial we were allowed the utmost latitude in our defense, and to read what we thought proper to the jury, and to address them upon the law as well as the fact; to read decisions at common law, and also before as well as after the revolution. And also what statutes of the United States we conceived to be applicable.

*Cross-examined.* In the first trial of Fries we contended that resistance to a particular law of

Congress was not treason, but only a riot. In the second trial we intended to admit that resistance to the laws in general, was treason, but to deny that resistance to a particular law was treason. It appeared to me the conduct of the court would justify counsel in withdrawing; and it did appear much more likely, that the President would pardon him after having been convicted without having counsel than if he had.

### *February 9.*

*Andrew James Dallas.* On the morning of the second trial of Fries, I did not enter the court until some time after it was called. Fries was then in the prisoner's box. My attention was attracted by an animated conversation between Mr. Lewis and Mr. Edward Tilghman. When Mr. Lewis observed me and related what he has stated here, he said that Judge Chase had declared that the court had made up their minds with respect to the law relative to treason, and had ordered three copies of the opinion to be made out. As the question was, whether we were ready to proceed with the defense. Mr. Lewis observed that there were no doubts as to the facts, and as the court had made up their minds as to the law he did not expect that he should be able to change them; and he should decline acting as counsel for Fries. I addressed the court, thinking there might be some mistake, for although I was certain that Mr. Lewis would not have related any thing that was not true, yet I deemed it probable I might have misunderstood him. I concluded by stating to

the court my determination not to consider myself as counsel for the prisoner any longer, under the opinion which the court had given.

I heard Judge Peters say to Judge Chase, "I told you so; I knew they would take the stud." Judge Peters expressed a wish that we would proceed with the defense, and to take any range we pleased. The bar and the audience appeared extremely surprised at the transactions of the day. On the second day Judge Chase said we might address the jury on the law, but it would be at the hazard of our reputation. This had the contrary effect rather than to induce me to proceed. In the interval Mr. Lewis and I visited Fries at the prison. We told him we had two objects in view: saving his life and to maintain our privileges as members of the bar. Under the then existing circumstances, we had no hopes of an acquittal; there were no doubts as to the facts and the court having made up their opinion as to the law and the jury having heard the declaration of the court which would influence their verdict; that if he would consent to our withdrawing from his defense, and refuse to accept other counsel, it would be a strong recommendation to the President for a pardon. He was at first extremely alarmed, but after some time he agreed to our proposition. We told him that if he insisted on it, we would proceed to defend him at every hazard.

On the next day we both stated to the court we were no longer his counsel, upon which both Judge Peters and Judge Chase

spoke in the manner in which Mr. Lewis has stated it. Judge Chase said that we might think to embarrass the court, but we should find ourselves mistaken. He then asked Fries if he wished other counsel assigned him, who replied that he did not know what was best for him to do, but would leave it entirely to the court. Judge Chase then observed, that by the blessing of God, they would do him as much justice as the counsel who had been assigned him.

On the first trial of Fries we were allowed to address the jury both on the law and on the fact—to read what authorities we pleased, both before and after the revolution in England, and also the statutes of Congress in order to show that Fries had only been guilty of a riot. Our law points were, that the constitution had defined the law concerning treason, and that the legislature, nor the judges had the power of defining it. We argued that the judges before the revolution in England held their office at the pleasure of the crown, and therefore would make anything treason. We took up the common law decisions to show, not what was the law but what had been their decisions. We cited the case of the man whose stag the king killed, and who wished the horns of the stag in the king's belly, and also that of the innkeeper who kept the sign of the crown, and who said he would make his son heir to the crown, in order to show the great lengths to which the doctrine of constructive treason was carried. We then contended that although the judges since the rev-

olution in England had become independent of the crown, yet they considered themselves as bound by these decisions of their predecessors, and therefore ought not to be considered as authorities to govern our courts on the subject of treason. We also read the statutes of Congress, particularly the first section of the act called the sedition law, in order to show that the legislature of the United States had declared the offense of which Fries was charged to have committed to have been only a riot, and punishable with fine and imprisonment. We attempted to show a difference between the case of Fries and the western insurrection.

*February 11.*

*Edward Tilghman.* Was present at the circuit court of the United States on 22d of April, 1800. (The witness corroborated the previous witnesses as to what took place.) When it appeared that the counsel would not proceed Judge Chase observed, "you may think to bring the court into difficulties gentlemen, but if you do you miss your aim." Judge Peters seemed very solicitous that the counsel should proceed, and asked them whether if an error had been committed by the court, why should they not be at liberty to correct it, and added that the papers had all been withdrawn, and I think that both the judges concurred in saying that the case was to be considered as if the paper had never been thrown on the table. The counsel continued firm in their determination of abandoning the prisoner. The court took great pains to induce them to act, and

before the prisoner was remanded to jail, expressed their hope that the counsel would think better of it the next day, and appear in his defense. On the third day the prisoner was brought up and asked whether he had any counsel. He replied that he had none, and that he would depend upon the court to be his counsel. Judge Chase then said "then by the blessing of God the court will be your counsel, and will serve you as well as your counsel would have done." The trial then proceeded and after the evidence, and a short statement of the law by the district attorney, Judge Chase charged the jury. He told them that they were the judges of the law as well as the fact, and that cases decided in England before their revolution would not be received by the court as the law with respect to treason.

*Cross-examined.* The usual practice in the courts is for the court to permit the counsel on both sides to argue the law before the jury at length, and after they finish, to charge the jury. They generally inform them what in the opinion of the court is the law, but that the jury are the judges both of the law and fact; and in capital cases have never seen them stopped by the court. In all my practice both in Pennsylvania and Delaware, have never known an instance of the courts informing the jury what was the law previous to counsel being heard.

I cannot say that all the jurymen attended at the time the paper was thrown down and in a situation that they could hear what passed. When Judge Chase observed that the counsel might



proceed at the hazard of their character, the general panel was in court.

*Mr. Nicholson.* You say that it is usual for courts to charge juries on the law, have you ever known the court to reduce their opinion to writing and to give it to the jury to take out with them? I never saw an instance of the kind in my life. Was present at the trial of Fries and when copies of a written opinion of the court were thrown down on the bar table there was much comment upon it among the members of the bar; but I know not whether any of the jury heard it.

*William Rawle.* Was present at the trial of Fries on April 22. Saw the papers thrown on the table, I know not whether by the court or the clerk; took up one of them and began to read; saw Mr. Lewis on the opposite side of the table, with one of the papers in his hand, which he looked at with apparent indignation and then threw it on the table; perceived much agitation among the gentlemen of the bar. Soon after I got home Judge Chase and Judge Peters came to my house. Judge Peters expressed apprehension that the counsel for Fries would decline acting for him. Judge Chase observed that he could not suppose, that that would be the case. I stated the gentlemen of the bar of Philadelphia were very independent and that in my opinion the counsel for Fries would not proceed unless the papers were withdrawn and they were permitted to go on in their usual way. Judge Chase said he was sorry that the opinion had been considered in the light it was, and

that it was not intended to preclude the counsel from going on in the usual manner, provided they thought proper. Both judges requested me to obtain all the copies of the opinion which had been taken, which I did. Will now refer to some notes which I took upon the remaining part of the transaction.

On the 23d of April John Fries was brought to the bar and the court asked if we were ready to proceed with the trial; I answered affirmatively. Mr. Lewis observed that if he had been employed by the prisoner he would think himself bound to proceed; but having been assigned as his counsel. (He was interrupted by Judge Chase, who said you are not bound by the opinion delivered yesterday, but are at liberty to contest it on both sides.) Mr. Lewis said he had understood that the court had made up their minds as to the law, and as the prisoner's counsel had a right to address the jury, both on the law and the fact, it would place him in too degrading a situation to argue the case after what had passed, and therefore he would not proceed with the defense. Judge Chase answered with impatience, "You are at liberty to proceed as you think proper. Address the jury and lay down the law as you think proper." Mr. Lewis answered with considerable warmth, "I will never address myself to the court upon a question of law in a criminal case."

Judge Chase observed that the counsel must do as they please. Mr. Dallas then rose and expressed determination not to continue as counsel for Fries.

Judge Peters added that the

papers were all withdrawn. Mr. Lewis said the paper was withdrawn but the impressions remained with the jury; he therefore should not act. Judge Chase said: "you can't bring the court into difficulties, gentlemen, you do not know me if you think so." He then asked Fries whether he was ready for his trial, or whether he wished other counsel assigned him. Fries appeared very much alarmed and replied, that he did not know what to do. I then asked the court to postpone the trial until the next day, which was readily acquiesced in. On the next day he was again asked whether he would have counsel assigned him, he replied with much firmness that he would look to the court to be his counsel. Judge Chase then answered, "then by the blessing of God the court will be your counsel, and will do you as much justice as those who were your counsel."

The jury were then called and Judge Chase took particular pains to inform Fries of his right to challenge, and that he might challenge thirty-five without showing any cause, and as many more as he could show cause against. After the evidence closed, I addressed the jury in as brief a manner as I could, consistent with my duty. The court then charged the jury, and they retired to their room, and in about half an hour returned with a verdict of "guilty." These are the general facts which took place.

*George Hay* (sworn). The evidence which I shall give relates to the conduct of one of the judges and the counsel for Callender, of which I cannot give an account of the whole transaction unless I be allowed to use a statement which I have, in order to refresh my memory.

*Mr. Randolph.* The court said that they would not suffer such cases as I have mentioned to be read to the jury, to mislead them, but I did not hear the court say that the counsel should not address the jury on the law. Have never known an opinion to be given in a criminal case before counsel were heard, except so far as charges to grand juries may be termed opinions on the law.

*Mr. Nicholson.* What was there in Judge Chase's conversation that induced Mr. Lewis to think, that he should be precluded from reading the statutes of the United States, to the jury? I know not why Mr. Lewis thought so, unless from the strenuous opposition which was made to them, on the first trial of Fries, on the part of the United States. Was there any thing in the conduct of the court, which induced Mr. Lewis to believe that he was to be precluded from arguing the law to the jury, and caused him so often to declare, that he would not address himself to the court in a criminal case? It appeared to me to be a misapprehension of Mr. Lewis. He supposed that it was intended to withdraw the question of law from the jury, and I thought the court did not set him right as explicitly as they might have done. Fries replied he had nothing to say.

*Mr. Harper.* I object to the witness' using the statement to refresh his memory. It does not appear that the statement was made at the time, or by himself and I think it inadmissible.

*Mr. Nicholson.* The gentleman does not wish to read the statement in evidence, but merely to refer to it to refresh his memory. I therefore presume he may be suffered to proceed.

*Mr. Rodney.* The witness does not intend to state any thing which he does not know, but only wishes to be able to relate the whole by looking at the statement. I presume that if one gentleman had taken notes at the trial of Callender, and another was called to give evidence, who had taken no notes, he would be permitted to look at the note of the other, in order to bring to his recollection circumstances which he had forgot. I therefore conceive that Mr. Hay ought to be suffered to refer to the statement to refresh his memory.

*Mr. Martin.* I have always understood that the only cases in which a witness is allowed to refresh his memory is, when he has made a statement at the time the transaction took place. Before Mr. Hay came into court he might have looked at the statement to refresh his memory, so he might have conversed with a person who was present at the time; but it will not be said that he shall be allowed to converse with any person at the bar of this court, and therefore in my humble opinion he cannot make use of a statement to refresh his memory not made by himself at the time.

The question was then taken upon allowing Mr. Hay to refer to the statement and was determined by the COURT in the negative. Yeas 16; nays 18.

*Mr. Hay.* Will relate the circumstances as well as I am able, without the assistance of the statement. First with regard to Basset, the juror. Several jurors being called to be sworn, the counsel for the traverser insisted that they were entitled to the benefit of the constitution, which secures to the accused a right of trial by an impartial jury. Judge Chase said he would take care that justice should be done the traverser in that respect. We wished to ask the jury whether they had formed an opinion on "The Prospect Before Us." Judge Chase told us that that was not the proper question to

put, but that the proper question was "Have you formed and delivered any opinion on the charges in the indictment." To this question the answer was necessarily in the negative, because none of the jury had seen this indictment. When Mr. Basset was called he manifested reluctance to serve on the jury; said he had made up his mind as to the book, and that it came under the sedition law. This objection was overruled by the judge; and he was asked whether he had formed and delivered an opinion relative to the charges in the indictment? He answered in the negative, and was sworn a

juror. I asked Judge Chase to allow me to put a question to the juror; his answer was "What is the question you mean to put? State it and if I think it a proper one you may propound it. Come what is your question." Notwithstanding the humiliation in being addressed in this manner, I stated to the court the question which I wished to put to the juror. It was: "Have you formed or delivered any opinion concerning the book called the 'Prospect Before Us,' from which the charges in the indictment were extracted." Judge Chase replied, "No, sir, you shall ask no such question." Colonel Taylor was called and sworn. Judge Chase asked counsel for Callender what they expected to prove by the witness. Mr. Nicholas said that we expected to prove what would amount to a justification of one of the charges. That Mr. Adams had avowed sentiments hostile to a republican government, and that in the senate he had voted against certain laws. Mr. Nicholas observed he hoped he should not be tied down to this charge, but should examine Col. Taylor as to anything else he might know which would benefit Callender. Judge Chase requested the counsel to reduce the questions to writing and submit them to the inspection of the court. An objection was made to this, but it was done. Judge Chase declared the evidence inadmissible as it did not go in justification of one entire charge. The judge was asked whether we might not prove a part by one witness, and a part by another. Judge Chase replied that the law was as he pronounced it, and that this

could not be done, and that Colonel Taylor's evidence did not go to prove the whole. I observed that I thought Colonel Taylor's evidence would go to prove both sentences of the twelfth charge; that Mr. Adams was an aristocrat and that he proved serviceable to the British interest in the manner which Callender meant. The judge said the evidence was inadmissible, and the counsel for Callender knew it to be so; that our attempt was to deceive and mislead the populace. I said no more, and the evidence was rejected. When we were requested by the judge to reduce our questions to writing, I felt no disposition to do it, and they were stated by Mr. Nicholas. Mr. Nicholas remarked that the attorney for the United States had not been required to state any question in writing. Judge Chase replied: "The attorney, when he opened his case, stated what he expected to prove; but although he did this, we were not bound to do it." My impressions are that the word "we" escaped the judge several times.

The next subject is painful for me to speak of. The judge is charged with rudeness to counsel. There were many expressions used by Judge Chase which were unusual to me and which I believe to be rude.

In the course of the argument I took as a ground that the law of Virginia should govern in the case of Callender. The judge gave me to understand that he thought I was wrong, and the idea was a wild notion. I have already mentioned the language of the judge with respect to the admission of Colonel Taylor's evidence. It was that we knew

the evidence to be inadmissible and that our attempt was to deceive and mislead the populace. He was also pleased to observe to us; "gentlemen, you have been in an error and keep pressing your mistakes on the court." On more than one occasion he charged the counsel with advancing doctrines, which they knew to be wrong. To satisfy the court that the book ought not to be read in evidence because the indictment did not refer to it, I observed that the words "tenor and effect" bound the party to a literal recital and in support of this position quoted several authorities. The judge interrupted me again and told me that I was mistaken. He said that the words "tenor and effect" in an indictment did not oblige the prosecutor to give more than the substance of the words. He mentioned that he wondered we did not contend for punctuation also. This latter part appeared to be intended for the bystanders. Mr. William Wirt, who appeared with me in the defense of Callender, was ordered by the judge to sit down, and the judge determined that the counsel should not address any arguments to the jury on the constitutionality of the sedition law. Mr. Wm. Wirt, in the course of the few observations which he made, stated a proposition and then said that the conclusion was syllogistic. Judge Chase said "a non-sequitur, sir." I can say with certainty that I was interrupted oftener by Judge Chase on the trial of Callender, than I ever was during sixteen years' practice. During all the trial I did not hear the voice of Judge Griffin. Judge Chase's manner

was generally this: after delivering his opinion he would turn to Judge Griffin and say, "and such is the opinion of the court." I recollect to have seen him speak to Judge Griffin, but it did not appear to be concerning the law.

It has never been the practice in the courts of Virginia for counsel to be compelled to reduce the questions which they mean to propound to a witness to writing and submit them to the inspection of the court.

*February 12.*

*Mr. Hay.* It was the intention of the counsel for Callender to defend him on the ground of the unconstitutionality of the sedition law. The gentlemen associated with me were not permitted to address the jury on the point. Mr. Wirt was interrupted two or three times by the judge for the purpose of telling him that the doctrine for which he was contending, that the jury had the right of determining the law as well as the fact, was true. Mr. Wirt then stated that the constitution was the supreme law of the land. Judge Chase told him there was no necessity of proving that. Mr. Wirt then went on to argue that if the constitution was the supreme law, and if the jury had a right to determine both law and fact of the case, the conclusion was perfectly syllogistic, that the jury had a right to determine upon the constitutionality of the law. It was then the judge addressed him in the words which I have mentioned, that it was "a non sequitur." At the same time he bowed with an air of derision. After Mr. Wirt sat down I addressed the court. I argued that

the jury had a right to determine every question which was to determine the guilt or innocence of the traverser. The judge asked me whether I laid down this doctrine in civil as well as criminal cases; because, said he, "If you do, you are wrong." I replied, that I considered it universally true, but that it was sufficient for my purpose if it applied to criminal cases only. I went on as well as I was able with the argument, when I was more than twice interrupted by the judge. Seeing that I should be obliged to undergo more humiliation than I conceived necessary I retired from the bar. Then Judge Chase told me to go on. I told him that I would not. He said that there was no necessity for my being captious. I replied that I was not captious, and that I would not proceed, and immediately retired from the bar, and I believe from the room in which the court was held.

To *Mr. Randolph*. One of the witnesses brought forward to prove the publication of the "Prospect Before Us," was the man who was employed by Callender to print it. I observed that if any of the witnesses were implicated in the charge, that they were not bound to give evidence. Judge Chase said that these observations were correct, but the witnesses might rest satisfied that they should not be prosecuted if they choose to give evidence.

*Cross-examined.* The cause was the cause of the constitution which I most religiously believed to have been violated by the passage of the sedition law, and I intended to defend Callender so

far as he was connected with the constitution. I had determined that if any person should be prosecuted for a violation of the sedition law, to step forward and defend him.

*John Taylor.* Was a witness in behalf of Callender. The judge directed the questions to be reduced to writing, and submitted to the inspection of the court—this having been done, Judge Chase declared that I should not be examined; did not give any intimation of what I should be able to prove, either to Callender or his counsel. After Judge Chase declared that I should not be examined, he turned to Judge Griffin and spoke to him, who replied in so low a tone of voice that I was not able to hear what he said.

Do not recollect the expressions used by the judge in interrupting counsel. The effect of them was a considerable degree of laughter among the audience. I thought the interruptions were in a high degree imperious, satirical and witty.

*Mr. Basset*, I think, stated he was opposed to Callender. The judge asked him whether he had any prepossession against the indictment. Basset replied that he had never seen the indictment, and the judge ordered him to be sworn on the jury. In this decision the opinion of Judge Griffin did not appear to have been asked.

Have never known a *capias* to issue in an offense, not capital, and the party to be ruled to trial the same term at which the presentment is made by the Grand Jury.

Have practiced law seven years; it has not been the prac-

tice for counsel to be compelled to reduce their questions to writing. Mr. Chase did express some such idea; but the attorney expressed his dissent to it. The request was made in a very feeble manner by the judge.

*Mr. Harper.* You have said that you considered the conduct of the court as tending to abash the counsel? Did it appear to have been so intended by the court. I thought it was, and that it had that effect.

*Philip Norborne Nicholas* In May, 1800, the circuit court sat in Richmond, and was composed of Judges Chase and Griffin. On the first day Judge Chase delivered a charge to the Grand Jury in which he spoke of offenses against the sedition law. The same day the Grand Jury returned with a presentment against James Thompson Callender, as the author of a book called the "Prospect Before Us." The indictment was sent up to the Grand Jury the same day, and a true bill returned. Callender lived in Petersburg, and process was issued against him; a warrant for his apprehension. He was brought by the marshal to Richmond. He was very much alarmed, and wished to make some concessions to the court. Mr. Hay and myself told him we were ready to render him our professional assistance. He stated it was impossible for him to go into a trial that term, and we prepared an affidavit, in which he stated the absence of a number of witnesses which were material to his defense, and also some books which he had not in his possession, and that his counsel were not prepared for trial even had the witnesses been pre-

sent. We moved for a continuance and argued it with zeal, being confident that we could not do justice to Callender if we proceeded to trial that term. Mr. Hay stated the law of Virginia, by which the jury had the right of assessing the fine. Judge Chase said that that was a wild notion, when applied to the courts of the United States, and told the attorney that he need not reply to our arguments, because the affidavit did not state that the witnesses could prove the truth of all the charges, and therefore, that the cause could not be continued. He concluded by ordering the marshal to call the jury. The jury were then called. I said I should challenge the array, because one of the jury had made use of expressions hostile to Callender, and referred as authority to trials per puis. Judge Chase observed that it was not the best authority, and sent for Coke upon Littleton. He cast his eye over a part of it, and observed that the law was clear, and that the array could not be challenged for such a cause, but that we might cause each juror to be examined on oath, as to his expressions. We proceeded to examine the jury. To the following question put by the court, the first juror answered in the negative. It was: "Have you formed and delivered any opinion on the charges contained in the indictment?" Mr. Hay requested the permission of the court to ask the jurors whether they had ever formed an opinion as to the "Prospect Before Us," from which the charges in the indictment were extracted. Judge Chase replied, that his was the

only proper question, and that an opinion must be delivered as well as formed. Mr. Hay then requested that the indictment might be read to the jury. Judge Chase refused it, and observed that he had indulged us as much as he could. The eighth juror called was John Basset. His reply was that he had never seen the indictment, but stated that he wished to be excused from serving on the jury because he had formed and delivered an opinion that the "Prospect Before Us" came under the sedition law. Mr. Chase observed that he was a good juror, and he was accordingly sworn. Among the witnesses were William A. Rind, who had been engaged in printing the book. Mr. Hay observed that some of the witnesses might criminate themselves, and that if any of them were engaged in the publication of the work, they were not bound to give evidence. Judge Chase observed that the gentlemen was correct as to the law, but if the witnesses chose to give evidence, that they might rest satisfied that they would not be prosecuted. Witnesses were sworn and Mr. Rind proved that he printed a part of the work. Colonel John Taylor was then sworn. Mr. Chase asked what we meant to prove by that witness. We replied that we did not know exactly but that we meant to ask him whether he had not heard Mr. Adams express aristocratical sentiments, and whether Mr. Adams did not while Vice-President, vote in the senate against the law for sequestrating British debts, and the law to suspend the commercial intercourse between the United States and Great Britain. Judge Chase

said that we must reduce our questions to writing. I observed that it was a practice unusual in the state courts, and in the present case would be extremely improper, because we did not know what Colonel Taylor might prove. Mr. Chase replied that his requisition must be complied with, and I accordingly reduced the questions to writing—they were as has been stated. Mr. Chase declared that the witness could not be examined because he could not prove the truth of the whole of any one charge, upon which Colonel Taylor left the court. The evidence being closed, the counsel for the United States commented very largely to the jury on the enormity of the offense. Mr. Wirt addressed the court and observed that the situation of the counsel for Callender was a very embarrassing one. Mr. Chase told him that he must not reflect on the court. Mr. Wirt then addressed the jury. He began by observing that by an act of Congress the laws of Virginia were in force in the courts of the United States sitting in Virginia. That by the common law of England, which had been adopted in Virginia, the jury had a right to decide on the law as well as the fact in criminal cases, and therefore they had a right to judge of the constitutionality of a law. Mr. Chase said: "Sit down, sir." Mr. Wirt observed that he was going on. Mr. Chase said, "No, sir, I am going on." Judge Chase then read a paper, in which he declared that observations of this kind must be made to the court. Mr. Wirt then addressed the court, and stated that he had not prepared himself upon the ques-



tion, but he conceived the point to be settled that the jury had a right of deciding on the law on criminal cases. Mr. Chase said that the jury was to decide the law. Mr. Wirt then said: "If the jury have a right to decide the law, and the constitution is the supreme law, the conclusion is perfectly sylogistic, that the jury have a right to determine the constitutionality of a law." Mr. Chase replied, "a non sequitur, sir;" upon which Mr. Wirt immediately sat down. I followed him and was not interrupted by the judge. Mr. Hay followed me, and observed, that the jury had a right to decide the law. Mr. Chase asked him whether he meant in civil as well as criminal cases, because if he did, he was wrong. Mr. Hay replied that he conceived the proposition to be universally true; but that it was sufficient for his purpose if it applied to criminal cases. He then proceeded and was again interrupted by the judge. Mr. Hay then stopped, folded up his papers and left the court, and we left it at the same time. What happened afterwards I know not.

*To Mr. Randolph.* I remember when the court overruled the testimony of Colonel Taylor, Judge Chase made use of this expression: "The counsel for the traverser know the evidence to be inadmissible, and wish to mislead and deceive the populace; and they keep pressing their mistakes upon the court. He several times appeared to wish to throw the counsel into ridicule." Mr. Hay attempted to prove that the words ought to have been set forth in the indictment literally. Mr. Chase said: "what the gen-

tleman has said is not law, he contends that the extract ought to have been set forth in the indictment *verbatim et literatim*. I wonder he had not contended that it ought to be *et punctuatim* also." Mr. Hay was contending that in all the precedents in which he had seen concerning indictments for libels, that the title of the book was mentioned. Mr. Chase said that he remembered the case of "The Nun in Her Smock," where the title was mentioned, but that it was not necessary.

I was at the time of the trial of Callender, Attorney General of the State of Virginia. Judge Chase applied the term "young gentleman" to me. He said that he had been so importuned by the young gentleman that he wished Mr. Nelson would suffer the evidence to go to the jury.

*Mr. Harper.* Did Judge Chase use the term "we" as connecting himself with the prosecutor? I considered it. Did the witnesses who were brought forward, and who were concerned in the publication of the book, express any unwillingness to give evidence? I believe they did not. Is it not an usual thing for the court to promise a witness that he shall not be prosecuted? I never knew an instance of the kind.

*John Thompson Mason.* Judge Chase presided at a circuit court at Annapolis in May, 1800. A conversation took place in the court house which was altogether jocular, and I have mentioned it to no human being before. Judge Chase asked me if I had seen the "Prospect Before Us," I replied that I had not, nor did I ever wish to see it. He observed that Mr. Martin, the Attorney Gen-

eral of Maryland had sent it to him, and that Mr. Martin had scored the passages that were libellous, and that he should carry it to Richmond with him; and that if the Commonwealth of Virginia was not utterly depraved, or that if a jury of honest men could be found there, he would punish Callender. He said he would teach the lawyers in Virginia the difference between the liberty and the licentiousness of the press. Judge Chase further observed, that he was as great a friend to the liberty of the press as any man, but as great an enemy to its licentiousness.

*John Heath.* Was one of the counsel at the bar of the circuit court, but was not concerned for Callender. One morning I went into the judge's room; Mr. Randolph, the marshal of Virginia, came in; he held a paper in his hand, and Judge Chase asked him what it was. Mr. Randolph replied that it was a panel of the jury to try Callender. Judge Chase asked him if he had any of those creatures or people called Democrats on it. Mr. Randolph replied that he made no discrimination. Judge Chase told him to look over the panel, if there were any of that description, strike them off. This was after the indictment was found against Callender.

#### *February 13.*

*James Triplett.* Traveled in the stage from Dumfries to Richmond in company with the judge when he was going to hold the court at which Callender was tried. The subject of the "Prospect Before Us" was introduced and the book was produced by

the judge and handed to me; informed the judge Callender had been apprehended once in Virginia under the vagrant law. Judge Chase replied that it was a pity they had not hanged the rascal. After we had got to Richmond the judge first informed me of the presentments being made against Callender, and that he expected I would have an opportunity of seeing him next day, as the marshal had gone for him to Petersburg. A day or two after this I met the judge coming down stairs, and he observed: "the marshal has returned without him, I am afraid that we shall not be able to get the damned rascal this court." I read some of the book when Mr. Chase handed it to me in the stage. There were some passages marked, but I do not remember what they were.

*John Basset.* Knowing the sedition law was odious to the people of my country, and that a number of them thought it unconstitutional and that I was weak or wicked enough to be a federalist, and thought the law constitutional, when I was called on to serve on the jury to try Callender, I conceived it to be proper to make a declaration of any impressions that I had on my mind, and if it should be an objection to my serving, that I might be excused; but that if I should be determined to be a proper juror, that I would do impartial justice between the traverser and his country, so I told the judge that I had never seen the "Prospect Before Us," but that in a newspaper I had seen extracts which were said to be from that book, and that if the extracts were truly taken,

that I had formed an unequivocal opinion, that it was a libellous publication—that I had formed no opinion with relation to the extracts being correct; also informed the court that I had formed no opinion with respect to Callender's being the author of the book or on the charges in the indictment. The court determined I was a proper juror and I was sworn on the jury. After we retired to our room to consult on our verdict, the book was produced, and I informed the jury, that I had never seen it before, and wished to have it read through; a number of the jury appeared to disagree to this, but I said that I would have it read, because the other parts of it might explain the passages in the indictment. In consequence of this the book was read through and we were in our room about two hours, when we returned into court and delivered our verdict, finding the traverser guilty. I will state a circumstance which made a strong impression on my mind. Judge Chase addressing himself to the counsel for the traverser said, that when his country made him a judge, they imposed on him the solemn obligation of an oath to execute the laws. That he conceived his opinion to be legal but that he might be in an error and therefore the questions might be all reduced to writing in order that a superior tribunal might correct the errors if any should exist.

*Senator Bayard.* What was the general conduct of the judge to the counsel and the counsel to the judge during the whole course of the trial?

To me the judge appeared to conduct himself with decision, but

without severity; he was at times facetious, but not sarcastical, and he appeared to wish that if Callender should be guilty that he should be punished; if innocent, that he should be acquitted. It appeared to me that the defense which the counsel for Callender attempted to make, was the constitutionality of the law, and that they had no hopes of saving him except on this ground, and when the judge determined that they should not address their arguments to the jury on that point, they became extremely mortified. Their persevering in this appeared to be the reason why they were so often interrupted by the judge.

*February 14.*

*Edmond Randolph.* Was present some little part of the trial of Callender, but was absent the greater part of it. Saw nothing that struck me as remarkable in the conduct of the court; saw nothing which conveyed to my mind the idea of corruption in the judge, an intention to oppress the party.

*George Read.* At Newcastle, Delaware, in June, 1800, Samuel Chase presided and Gunning Bedford, district judge, was with him. Mr. Chase delivered a charge to the Grand Jury on the first day, they returned into court, and upon being asked whether they had found any presentments or bills of indictment, they answered in the negative. Judge Chase observed that he had been informed that a highly seditious temper had manifested itself among a certain description of people in Delaware, particularly in Newcastle county, and more especially in the town

of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order; that the name of this printer was, but here the judge paused and said: "But perhaps it may be assuming too much to mention his name, but it becomes your duty, gentlemen, to inquire into it." Several of the Grand Jury made a request to the court to be discharged, and assigned for a reason that some of them were farmers and that it was the time of harvest. The judge observed that the business to which he had called their attention was of a most urgent and pressing nature, and that he could not discharge them until the next day, when further information would be given them on the subject to which he had referred them. The judge then addressing himself to me as the attorney of the district, asked whether I had any criminal charges to prefer. I replied that none had come to my knowledge, and that I believed none would accrue; but certainly said the judge to me, "you might make some discoveries, by making proper researches, have you not some persons in this state who have been libelling the government, or the administration of the government of the United States." I am told sir (continued the judge) that there is a printer in the town of Wilmington, who publishes a most scurrilous paper; have you not two printers in that town? I told him I believed there was. The judge replied, "one of them is the seditious one; I think it a part of my duty and he shall be taken notice of—and it is your duty, Mr. Attorney, to examine into af-

fairs of this nature. The times require that this seditious temper of the press should be discouraged and suppressed. Can you not procure a file of this printer's papers, and between this and tomorrow morning ascertain whether he has not been guilty of libelling the government. This must be done. I think it is your duty." Told the court I believed I was acquainted with the duties of my office, and was willing to discharge them; that I was not in the practice of hunting up offenses, that I had not a file of the printer's papers, but that if a file was procured me, I had no objection to examine them, and communicate with the Grand Jury on the subject. The judge said he was satisfied with that, and observed that he could not discharge the Grand Jury, but they must attend the next day at the usual hour. The judge then directed that a file of the papers should be procured for me, and these I understood to be the papers filed, "The Mirror of the Times and General Advertiser." I examined them and did not discover any libellous matter coming within the provisions of the sedition act. Next morning I sent the file of papers to the Grand Jury, believing it to be the wish of the judge. At the request of the Grand Jury I waited on them in their room. The foreman observed there had been a difference of opinion among the jury whether it was an indictable offense or not. I informed the jury that the publication did not come under the sedition law, and was only a libel punishable at common law; and that Judge Chase himself had determined in the case of the

United States against Worrell, for an attempt to bribe Mr. Coxe, the commissioner of the revenue—that the circuit courts of the United States had no cognizance of offenses committed at common law, and that therefore they could not present the printer for that publication. The bundle of papers were brought into court and laid on the table. Judge Chase asked me what had been done. I submitted to Judge Chase the conversation which I had with the jury, and the observations that I had made to them, in which he acquiesced, and the affair was passed over in an affable and polite manner on the part of Judge Chase.

*James Lea.* At the court at Newcastle, June, 1800, I was a juror; heard the judge speak to us as related by the last witness. Next day a file of papers was produced and examined, we found nothing seditious in it, except something written against Judge Chase, which the attorney when being sent for informed us did not come under the sedition law. We returned into court and some conversation ensued between the judge and the attorney, and we were then discharged.

*John Crow.* Was present at the circuit court at Newcastle in June, 1800. On the second day the judge asked the attorney whether or not the Grand Jury had found anything in a file of papers which was lying on the table worthy of presentment. He answered, they had found nothing but a piece against the judge himself. The judge replied that that could not be taken notice of, and shortly after he discharged the jury.

*John Montgomery.* I heard a

charge delivered by Mr. Chase to a Grand Jury at Baltimore, in May, 1803. He said he would give some few observations to them before they retired; that they flowed from a wish for the welfare of the community. It was important that the people should be truly informed at that crisis, that falsehood was more easily disseminated than truth, and that the latter was attended to with reluctance against popular prejudice. That the present administration was weak, relaxed and not adequate to the discharge of their functions, and that their acts flowed not from a wish for the happiness of the people, but for a continuance in unfairly acquired power; that a violation of the constitution had taken place by the passage of the act of Congress which repealed the judiciary system and removed the sixteen judges from office, and that Congress had made a violent attack upon the independence of the judiciary. The judge also found fault with the law which had been passed by the legislature of Maryland in the year 1801, which went to remove the district judges of Maryland; he said, these acts were a severe blow against the independence of the judiciary. He said that since 1776 he had been an advocate for a republican form of government, that it was his wish that freemen should be represented by persons elected by men who had an interest with, a property in, and an attachment to the community. He quoted the language of the bill of rights, he found fault with the law which had passed the legislature of Maryland, which is styled the universal suf-

frage law; and said, that this also affected the independence of the judiciary; that every free white male citizen under the law possessing the qualifications of age and residence, although he should not have an interest or property, or an attachment to the community, being suffered to choose their legislators and the judiciary being dependent on the legislature for their salary and continuance in office, few men of character and ability would accept the appointment of judges on such tenures. These measures were destructive of the happiness and welfare of the community that they would have a tendency to sink the government into a mobocracy, the worst of all possible governments; the framers of the constitution of Maryland were men of patriotism and ability, and the names of some of them were on the journals of Congress, and on the journals of the convention of Maryland that ratified the constitution of the United States. And the sons of some of those men were the chief supporters of these destructive measures; where there were equal laws and equal rights there was freedom, but where the administration of laws was partial and not certain the people were not free and that we were approaching to that state of things. There was but one act remaining to be done, which was the law which had passed the legislature of Maryland to change the constitution, and which was to be approved or rejected by the succeeding legislature, which went to abolish the two superior courts of Maryland, and then there would be nothing in the constitution

worthy of care or preservation. The judge called on the Grand Jury to pause, and when they returned home to use their utmost endeavors to prevent these impending evils and save their country; that the people had been misled by misrepresentation, falsehood, art and cunning. That by correcting these errors, the threatened evils might be averted; have read the answer of Judge Chase, and will take this opportunity of stating a fact contradictory of a part of it. The judge says that at the succeeding legislature of Maryland the law for abolishing the two superior courts of Maryland was abandoned by common consent. It is true, that the law was abandoned by common consent, but not for the reasons assigned by the judge in his answer. The reasons of the legislature were—

*Mr. Harper.* I presume the witness cannot be permitted to state the reasons of the legislature. He may state his own reasons, but I cannot suppose that he is competent to state the reasons of the legislature.

The VICE-PRESIDENT. The reasons of the legislature of Maryland have no connection with the question before the court, and is not proper evidence to be given to them.

*John Thompson Mason.* Was present when a charge was delivered at Baltimore, in May, 1803 by Judge Chase. I can charge my recollection with but three great points in the charge. The first was a pretty strong and censuring animadversion upon the repeal of the judiciary system by Congress, and it was spoke of as a measure calculated to destroy the independence of

the judiciary. The second was the alteration of the constitution of Maryland, with respect to universal suffrage. Judge Chase spoke of this measure, as calculated to sap the foundation of the government. The third was this. An attempt had been made to change the judiciary system of Maryland, and a law had passed one legislature and it required the sanction of another to make it a part of the constitution, which abolished the two superior courts of that state. He spoke of this amendment as dangerous in its nature, and that if carried into effect, would so injure and deface the constitution as to leave little or nothing in it worthy of preservation. He concluded his remarks in an earnest recommendation to those to whom he addressed himself to prevent the re-passage of the latter act, so as to give it validity. There were in court at least two gentlemen whose fathers had been members of the Maryland convention who framed their constitution. Judge Chase observed that it was a subject of peculiar concern to him to see some gentlemen engaged in demolishing that fair fabric which their fathers in conjunction with him, had toiled with so much earnestness in erecting. Judge Chase delivered a written charge, yet he made several extempore remarks, which I considered as an enlargement on the written charge.

*Samuel Harrison Smith.* As to the charge delivered to the Grand Jury at Baltimore after a definition of the offenses cognizable by the Grand Jury, Judge Chase said he hoped he should be pardoned for making a few additional observations. He had,

he remarked, been uniformly attached to a free republican government, and had actively participated in our revolutionary struggle to maintain it. He still remained attached warmly to the principles of the government then established. Since that period, however, certain opinions have sprung up which threatened with ruin the fair fabric then raised. It had been contended that all men had equal rights, derived from nature, of which society could not rightfully deprive them. This he denied. He could conceive of no rights in a state of nature, which was in fact a creature of the imagination, as there was no condition of man in which he was not, under some modification, subject to a particular leader or particular species of government. True liberty did not in his opinion conflict in the possession of equal rights, but in the protection by the law of the person and property of every member of society, however various the grade in society which he filled. Nor did it conflict in the form of government in any country. A monarchy might be free, and a republic a tyranny. Wherever the laws protected the person and property of every man, there liberty existed, whatever the government was. Such, said he, is our present situation. But much I fear that soon, very soon, will our situation be changed. The great bulwark of an independent judiciary has been broken down by the legislature of the United States, and a wound inflicted upon the liberties of the people which nothing but their good sense can cure. (Judge Chase then went into an assertion of

the right of the judiciary to decide on the constitutionality of laws.) He adverted to the proceedings of the legislature of Maryland. He commented on the wisdom and patriotism of those who had framed the constitution of that state. That wisdom and patriotism has never conceived liberty to consist in every man possessing equal political rights. To secure property the right of suffrage had been limited. The convention had not imagined, according to the new doctrine, that property would be best protected by those who had themselves no property. The great rampart established in the limitation of suffrage was now demolished by the principles of universal suffrage engrafted in the constitution. In addition to this, a proposition was now submitted whose ratification depended upon the next legislature and which if ratified, would destroy the independence and respectability of the judiciary, and make the administration of justice dependent upon legislative discretion. If this shall, in addition to that which establishes universal suffrage, become a part of the constitution, nothing will remain that will be worth protecting. Instead of being ruled by a regular and respectable government, we shall be governed by

an ignorant mobocracy. When he reflected on the ruinous effects of these measures, he could not but blush at the degeneracy of the sons who destroyed the fair fabric raised by the patriotism of their fathers.

*Senator Bayard.* Did you hear anything relative to the character of the present administration? Nothing but what may be inferred from what I have related.

*John Stephen.* Was present when the charge was delivered by Judge Chase to the grand inquest at Baltimore, in May, 1803. On the principal points of the charge it agrees with the other witnesses. Mr. Chase spoke upon the act of Congress which repealed the judiciary, he stated that he was opposed to the universal suffrage bill and said he was in favor of the principle in the bill of rights. He also spoke against natural rights, and against the law which had passed one legislature of Maryland for the abolition of two superior courts. He recommended to the jury to prevent the passage of it. Cannot undertake to say whether Judge Chase confined himself to the paper before him or not. He declared that the independency of the judiciary had been materially affected by those measures.

#### MR. HARPER'S OPENING FOR THE DEFENSE

*February 15.*

*Mr. Harper:* We feel, Mr. President, so entire a confidence in the justice and discernment of this honorable Court, and are so strongly impressed with the importance of its time, at this moment, when so much indispensable public business presses on its attention, that nothing but an anxious desire to remove



every imputation of misconduct, in a moral, as well as in a legal point of view, which might rest on the character of the honorable respondent, on account of any of the transactions which furnish the subject matter of this prosecution, could induce us to occupy, by adducing testimony on our part, any portion of that time which we know to be so precious. We consider the articles of impeachment as wholly unsupported by the testimony adduced on the part of the honorable Managers; and, had we no further object in view than a mere legal acquittal, we should most cheerfully submit the case on that testimony.

But, although no legal offense be proved, which could warrant a conviction on any of these articles, yet some parts of the testimony produced in support of them, might, if left unexplained, throw on the conduct of our honorable client some shades of impropriety, which it is in our power, and therefore is our duty, to remove.

In the discharge, however, of this duty, our wish to expedite to the utmost, a proceeding which has already occupied so long the attention of this honorable body, and to leave as much time as possible for finishing the important business of the session, restricted in its duration, and now drawn so near to its close, has induced us to waive our privilege of making a full and argumentative opening of our case, a privilege given to us by the usual course of judicial proceedings and confirmed by the example of the honorable Managers, and to confine ourselves to a brief statement of the points to which our testimony will be directed. I request the indulgence of this honorable court while I present this statement to its view, after which we shall proceed with all possible dispatch in the examination of our witnesses, and the production of our written evidence.

As to the case of Fries, which is the subject of the first article, we shall produce evidence to prove that the general definition of treason contained in the paper delivered to the prisoner's counsel by the respondent had not only been settled by two solemn decisions in the same court, but had been pronounced publicly by Judge Iredell as the settled law of

the land, in his charge to the Grand Jury, by which the first indictment against John Fries was found. We shall then prove more particularly than has yet been done the contents of the paper thus delivered, and shall produce the original paper itself.

We shall then proceed to show that when the respondent on the second day of the trial, told the counsel for Fries that they were at liberty to proceed in the defense, in their own way, without being restrained by any thing that had passed on the preceding day, he did not accompany this permission with a menace of any kind, as the learned counsel themselves have supposed, and have stated in their testimony at this bar; but merely informed them that in conducting the defense they would be subject to no restriction except that which a regard to his own character ought to impose on every member of the bar: And from hence we shall show, as applicable to other parts of the case, how little reliance is to be placed on the recollection of angry men, whatever may be their general title to belief.

Proceeding then to the next great subject of accusation, the case of Callender, we shall prove that the copy of the "Prospect Before Us," which was seen in the possession of Judge Chase, was not marked or scored by him, or with any view to the prosecution of the author, but by a gentleman who had purchased the book for his own amusement, and in reading it had, according to his custom, scored the most remarkable passages before he knew that the judge was to hold court at Richmond, and afterwards gave it to him, for his amusement on the road.

We shall then show that the private conversation which took place at Annapolis between the respondent and Mr. Mason, as given in evidence by the latter gentleman, was a mere jest, provoked and drawn forth by Mr. Mason himself; whose recollection of the affair we shall prove to be far less accurate than that of a man ought to be, who, at the distance of almost five years, undertakes to adduce at the bar of a court of justice, a transient, jocular and confidential conversation, in support of a criminal prosecution.

Following the judge then to Richmond, we shall prove that far from manifesting any desire to procure the punishment of Callender, if innocent, he felt a strong wish for the escape of that miserable wretch whom he probably considered as the needy and despicable tool of other men's designs; and therefore as the object of contempt and pity rather than of resentment. We shall also show that the respondent instead of wishing to pack a jury for the conviction of this unfortunate and despicable object, was desirous that he might be tried by a jury composed entirely of persons belonging to that party whose cause his book was written to support.

As to the conversation stated by John Heath, to have taken place between the respondent and the then marshal of Virginia, relative to striking off from the pannel of jurors formed for the trial of Callender, "all those creatures called democrats," we shall show, by the most unquestionable testimony, that no such conversation ever did take place, and that the witness who has stated it was utterly mistaken in all the circumstances which he has stated.

We shall also prove that on the pannel of jurors which actually was formed for the trial of Callender, there were several persons well known to be of the same political opinions which he then supported and that if they were not sworn on the jury, it was because for some reason best known to themselves they refused or neglected to attend.

After establishing these preliminary points we shall proceed to prove that the statement given by the honorable Managers relative to John Basset's supposed objection to serving on the jury is wholly incorrect; that Basset made no objection, nor expressed any unwillingness to serve, but merely suggested a scruple of delicacy, which he supposed might disqualify him and on which he wished for the direction of the court. That this scruple was not of such a nature as to constitute a legal disqualification, and that the question propounded to him and the other jurors was the same which had been adopted on consideration in the case of Fries. On all these points we shall fully corroborate the testimony of Mr. Basset himself.

With respect to the rejection of Col. Taylor's testimony, we shall prove that the respondent, after pronouncing the opinion of the court on that point, offered to state a case for the purpose of submitting the point to the consideration of all the judges of the supreme court, and to grant a new trial if their opinion should differ from his. From which we shall contend that he could not possibly have made this decision, admitting it to be erroneous, through any improper motive.

We shall also prove that although the respondent did not consider himself authorized to grant a continuance in the case of Collender, for which no legal ground was shown, he did offer to postpone the trial for six weeks or more, in order to accommodate the traverser and his counsel, and also offered to grant them attachments for bringing in such of their witnesses as were within the reach of the court.

As to the conduct of the respondent on this trial we shall prove that it was marked throughout with a mildness and propriety, little to be expected after the incorrect and irritating behavior of some of the counsel. A further instance to show how little attention is due to the statements of angry men, who come in the character of witnesses, to complain of their fancied wrongs. We shall, moreover, prove that on every legal question decided by the respondent, he consulted his colleague Judge Griffin, and merely delivered the opinion of the court; although in settling mere questions of order he acted from himself as his duty and authority as presiding judge required. And finally we shall produce a witness who attended the whole trial and took down all the proceedings in shorthand and who will present to the view of this honorable court an accurate and authentic statement of all that passed.

Proceeding then to the subject matter of the fifth and sixth articles, we shall prove that the judges of the Supreme Court of the United States, acting under the statute for establishing the judicial courts have never considered the state laws as the rule of proceeding in cases like that in question; that the provisions of the act of Congress relied on by the sixth article, have always been regarded by those judges as relating to rights acquired under the state laws, and not to process, in

criminal cases under the statutes of the United States. That the practice in the state courts of Virginia, under the state law relied on by the fifth article has been to issue a *capias*, and not a summons, in cases of misdemeanors punishable by imprisonment or to be tried on indictment and to use a summons in those cases only where the offense was to be punished by fine without imprisonment, and the offender was to be tried by the court in a summary way without an indictment. And to show that the recollection even of the most correct men is not always to be relied on we shall produce a record in which it appears that the gentleman who has given his testimony with so much candor and propriety and who, though still very young has been nearly five years attorney general of Virginia, did himself in his official capacity order a *capias* on a presentment in a case not capital.

And finally to remove all shadow of doubt from this part of the case we shall prove that when the presentment had been found against Callender and the respondent was about to order process upon it, he inquired of Mr. Nelson, the district attorney, what process was proper in such a case, and was informed by him that a *capias* was the proper process; whereupon the *capias* actually issued was drawn up and issued under the immediate direction of that officer; on whom, consequently, and not on the respondent, who had no better means of gaining information on such a point, the blame of the mistake, had one been committed, must have fallen.

On the subject of the respondent's conduct at the circuit court, held at Newcastle in 1800, which furnishes the matter of the seventh charge, we shall prove that the very improper and unbecoming expressions attributed to him, relative to "a highly seditious temper, manifested by a certain description of people in the state of Delaware, and especially in Newcastle county, and more particularly in the town of Wilmington," were never uttered by him; and that he neither said nor did any thing more than is admitted by him in his answer and was, as we contend, required by his duty.

We shall then proceed to the subject matter of the eighth article, the charge delivered by the respondent in Baltimore,

and there we shall produce a cloud of witnesses to show that he uttered no such expressions concerning the present administration, their character, their mode of acquiring power, and their objects in its exercise, as are attributed to him by Mr. Montgomery, and that he neither mentioned the present administration, nor alluded to them, except so far as they might be implicated in his remarks on the effects likely, in his opinion to flow from the repeal of the judiciary act. I have no hesitation, Mr. President, in declaring that if the respondent had uttered on such an occasion such expressions as this witness has put into his mouth, such conduct though not amounting to an impeachable offense, would have been highly improper, and deserving of severe reprehension. Hence we feel particularly solicitous to refute this accusation, and happily we have it most completely in our power: for we shall not only show that of the members who were present and attended particularly to this charge, not one person except Mr. Montgomery heard these expressions; but we shall prove by various witnesses who were near to the respondent and observed him particularly while delivering the charge, that he read it from a written paper and delivered nothing but what he so read; and, to make refutation complete, we shall produce the paper itself, attested by the person who copied it, and those who heard it read, and shall submit it to the consideration of this honorable court, which will find in it no such expressions as are stated by Mr. Montgomery.

Such, Mr. President, is the statement of what we expect to prove, and this statement we shall now proceed to substantiate by our testimony.

#### THE WITNESSES FOR THE RESPONDENT.

*William Rawle.* The restriction which was laid on the counsel at the trial of Fries was applied to the counsel for the United States as well as the counsel for Fries, that the counsel on neither sides should attempt to mislead the jury. That the counsel for the United States

should not cite cases which destroyed the salutary provisions of the statute of William, as that of dispensing with the necessity of having two witnesses to prove an overt act of treason, and that the counsel for the prisoner should not cite common law cases concerning treason.

*William Meredith.* On April 22, 1800, Judge Chase observed that the court had considered the overt acts charged in the indictment against Fries, and had made up their minds as to the constitutional definition of treason; and to prevent mistake, had caused three copies of their opinion to be made out by their clerk—the paper was then thrown down on the table. Judge Chase observed, that the giving of his opinion was not intended to prevent the counsel from arguing the law. Fries was placed at the bar, and the judge inquired of the counsel whether they were ready to proceed with his trial. Mr. Lewis observed that he declined acting any longer as counsel for the prisoner. Judge Chase said that the counsel were not to consider themselves bound by the opinion of the court which had been delivered the day before. Mr. Lewis referred to the opinion, and said that it in fact precluded the counsel from addressing any arguments to the court. Judge Peters said that the opinion was withdrawn. Judge Chase observed that the counsel were at liberty to argue the case fully, both as to the law and fact, before the jury. Mr. Lewis then stated to the court his idea of the appositeness of common law cases, Judge Chase stated his belief that they were inapplicable, but he remarked that the counsel might go on and cite them to the jury as it was not the intention of the court to circumscribe them in their defense or to take the decision of the law from the jury. He stated farther, that the counsel might manage the defense in any way, having at

the same time a regard to their own characters. Judge Peters made some remarks calculated to put the counsel in a good humor and induce them to proceed; but they persisted in declining. Thus far the court manifested a conciliatory disposition towards the counsel, but when it was perceived that they would not proceed with the defense of Fries, Judge Chase told them, "If you suppose, you will embarrass the court, gentlemen, by such conduct, you are mistaken," or words to that effect. He then asked Fries if he was ready for his trial, or would have other counsel assigned him. Fries observed that he did not know what to do, but would leave it to the court. Mr. Rawle then asked that the trial be postponed until the next day, which was done. The following morning Fries was asked whether he wished other counsel assigned him. He declined having counsel and observed that the court should be his counsel. Judge Chase then said in the most pathetic and impressive manner, "Then by the blessing of God the court will be your counsel, and will do you as much justice as those who were assigned you." The trial then proceeded.

*Samuel Ewing.* This paper is in my handwriting. It was copied from a paper thrown down by the court on the bar table at the trial of Fries. While I was in court Judge Chase mentioned that the counsel were wrong as nothing which had fallen from the court as a restriction—and asked the counsel whether they meant to go on. The conversation ended with a determination

on their part not to proceed with the defense. Judge Chase observed, that after the court had explained their minds on the law, that if the counsel still persisted in citing cases which were not law, they must do it at the risk of their legal reputation; did not understand this as a menace on the part of the judge.

*Edward F. Coale.* This is a copy of a paper given to me by Judge Chase, to copy for him, and was made previous to the trial of John Fries. It was copied from one in the handwriting of Judge Chase.

*Mr. Hopkinson.* What were the reasons assigned by the judge, when he gave you this to copy?

*Mr. Nicholson* objected and the question was disallowed by the Court. Yeas 9; nays 25.

*Mr. Coale.* He appeared to take uncommon pains to prevent Fries from asking any question that might criminate himself, and to remind him of his right to challenge, and examining the witnesses produced on the part of the United States.

*Luther Martin.* Was in New York during the sitting of the circuit court there; observed in a newspaper that the "Prospect Before Us" was advertised to be sold at Greenleaf's printing office. Went to the office and purchased a couple of them. Judge Washington, who was then holding the court at New York, sent his servant and purchased one. Read the book, and as in my usual custom scored whatever passages I thought remarkable, either for merit or demerit, a number of them. I did not know then that Judge Chase was to hold court at Richmond, nor were

the passages scored with any intention to be used in a prosecution. There were passages scored which could not have been used in the indictment, because I scored all those which reflected on the character of General Washington. When I returned home and found Judge Chase was going to Richmond, gave him the book and observed that he might amuse himself with it on the road and afterwards make what use of it he pleased. My name was on the title page.

*James Winchester.* Attended in May, 1800, at Annapolis, as a district judge, and held the circuit court there in conjunction with Judge Chase. Judge Chase had delivered what has been called his farewell charge to the grand jury. Mr. Mason observed, "Well, judge, what do you call this charge? Is it a moral, a political, a religious or a judicial one?" Judge Chase replied that he believed that it was a little of all. Mr. Mason informed the judge that he would not deliver such sentiments in Virginia. It appeared to me that Judge Chase thought he meant to say that he would be afraid, and he said that he would not only deliver such sentiments, but would execute the law as he declared it. The conversation then turned on the book, the "Prospect Before Us," and it was spoken of as a book written by Callender. Judge Chase said that Mr. Martin had given him the book, and that he should take it with him to Richmond. I agree with Mr. Mason that the whole conversation was of a jocular nature; do not remember particular expressions that he does; such as the judge's observing,



that if the state of Virginia was not wholly depraved, or if there were an honest jury to be found in it, that he would punish Callender. Those expressions might have been used by Judge Chase without my hearing them.

*William Marshall.* On May 21st Judge Chase arrived in Richmond. On the 22d the court met, and Judge Chase charged the grand jury. On the 24th they returned with a presentment against James Thompson Callender as the author of a book called the "Prospect Before Us." Judge Chase inquired what was the process proper to be issued on the presentment. Mr. Nelson answered, that he supposed a *capias* was. Judge Chase said something about a bench warrant, which was unknown to us. Judge Chase then observed, that all three of us must draw a form of arrest, and the one which he most approved of should be used. I finished mine first, and the judge approved of it and ordered me to put the seal of the court to it and deliver it to the marshal, which I did. On the 30th Judge Griffin arrived. On the 27th the marshal brought Mr. Callender into court in custody. In the evening Judge Chase observed, that perhaps Callender might have some application to make to the court. Mr. Merewether Jones informed the court, that Callender was not prepared to make any application, but that one would be made the next day. Judge Chase asked if Callender could give bail. The reply of Mr. Jones was, that he could in a moderate sum. Judge Chase then asked Callender what he was worth, who replied that he was about equal. The judge did

not appear to understand him, and asked what he meant by it. Callender said that he had no property, and that he owed about two hundred dollars. That he had more than that owing to him, but did not expect to receive more of it than what he owed, so that he did not conceive himself worth any thing. Judge Chase asked whether he could procure bail in the sum of two hundred dollars. The reply was in the affirmative, and a recognizance entered into—Callender in the sum of two hundred dollars, and two sureties in the sum of one hundred dollars each. On the 28th application was made by Mr. Hay, for a continuance. He stated to the court that he was not well acquainted with the practice in the circuit courts, but that he had prepared a general affidavit, stating, that the traverser was not prepared for trial on account of the absence of material witnesses. Judge Chase told him that he had better file a special affidavit, and might take until the next day to prepare it. He also said that it was necessary for the traverser to plead to the indictment, before any motion for a continuance could be made, as he might plead guilty. Mr. Hay assured the court that that would not be the plea. Callender was arraigned and plead not guilty. On the 29th Mr. Hay produced his special affidavit. The affidavit stated that a variety of witnesses were absent, who were material to the defense of the traverser—that there were a number of written documents and also a book written by Mr. Adams entitled, "An Essay on the Canon and Feudal Laws," which were also necessary

for his defense and without which he could not safely go to trial; he therefore moved for a continuance. Judge Chase observed that every person indicted for publishing a libel and intending to prove the truth of his assertions by documents, ought always to have those documents in his possession. That the affidavit was not sufficient to procure a continuance, but that they should have time to procure the attendance of their witnesses. He said that the court would last for two weeks, but that would not be sufficient, he would give them a month: "Nay, gentlemen (said he), 'I will give you six weeks. I cannot remain here six weeks, because I am bound to hold a court in Delaware, but I will go to Delaware and hold the court, and return here in six weeks and try Callender.'" When Judge Chase made the offer I do not recollect that any reply was made. Judge Chase then observed that the trial should come on at such a time, as the witnesses who lived in Virginia could have time to attend, and asked the marshal concerning the residence of Mr. Giles and General Mason, and whether he had any deputies in court who could be sent after them. The reply was that a deputy marshal was there, who could go after them immediately. Judge Chase then directed me to issue summonses for the witnesses, returnable on Monday, 2d of June. I accordingly issued subpoenas for General Mason, Mr. Giles and Colonel Taylor. The marshal was directed to use all expedition, and on Monday the subpoenas were all returned executed, with the memorandums when they

were done. On Monday morning Colonel Taylor appeared in court; the others did not. A postponement was asked by the counsel for Callender for two hours, in hopes that Mr. Giles would arrive. Judge Chase informed them that they might have a postponement until the next day. On Tuesday morning a motion was again made, founded on the affidavit for a continuance. It received the same decision it had before, and the marshal was ordered to call the jury—twelve jurors appeared when called. Some objection was made to the panel of the jury. Authority was called for and I brought down Coke upon Littleton. Judge Chase looked at it and decided that the panel should not be quashed. When the jury had all answered, the counsel proposed to propound a question to them. Judge Chase observed that he would propound the proper question to them, and he asked them the following question: "Have you formed and delivered an opinion on the charges in the indictment." The answer of the first juror was, that he did not know what the indictment was. Eight or nine jurors answered in the same manner, and the counsel declared it unnecessary to put it to the subsequent ones.

*To Mr. Harper.* Mr. Giles was a juror on May 29th. Judge Chase asked me whether that was Mr. Giles, the celebrated member of Congress; told him it was. He said he wished that Mr. Giles should be on the jury, and added, that if his situation would permit him to drop a hint to the marshal, it would be to summon a jury to try Callender, composed en-

tirely of Callender's political friends, but that it would be improper for him to interfere. Judge Chase was a total stranger in Richmond, and asked me to call on him as often as I possibly could. I generally went every evening after the court rose, and every morning and accompanied him to court. One day, about ten, went to his lodgings and found Mr. Heath there in the act of leaving the room. No conversation took place between Judge Chase and the marshal, concerning the summoning of the jury, while Mr. Heath was there.

When the witnesses who were summoned did not attend, Judge Chase offered to issue attachments.

I sat near the judges and frequently heard them in a low conversation, but I recollect nothing distinctly, except when Mr. Basset was directed to be sworn on the jury, Judge Chase asked him "whether he had formed and delivered an opinion on the charges in the indictment," to which Mr. Basset replied in the negative. Judge Chase then observed to Mr. Griffin that this was similar to a murder. That a man might make up his mind as to what constituted murder; but that if he did not apply it to the particular case, that he was a competent juror; and then directed Mr. Basset to be sworn, to which Judge Griffin assented. Judge Griffin was consulted as to the rejection of Colonel Taylor's testimony, understood him to assent to all the acts of the court.

*Cross-examined.* Believe that all the jury who tried Callender were opposed to him in political sentiments. The *capias* was issued against Callender, issued be-

fore the bill was found; have rarely seen a trial where the interruptions were so frequent. Counsel for the traverser appeared to be in a great state of irritation, and there appeared as much decision on the part of the court as I ever witnessed; there was much warmth displayed, but am unable to say who commenced it. The judge said all the charges in the indictment must be proved, or it was useless to prove any; and therefore it was unimportant that any of the traverser's witnesses should be there, provided they could not prove all. He said: "Suppose a man should say that I was a scoundrel, a rogue, and an ugly fellow; he is indicted for it, and pleads not guilty. On the trial he proves that I am a very ugly fellow, will any man say that this will justify him for saying that I was a scoundrel and a rogue?" All this was in good humor. The judge frequently said, "I am acting under an oath, and bound to give my opinion on the law; but I am a fallible man, and it is possible that I may be in error, and therefore the whole case may be stated in writing, and I will assist the counsel in making out a writ of error, and allow them to take the case up to the Supreme Court as soon as possible."

*February 16.*

*David M. Randolph.* Was marshal of the district of Virginia at the trial of Callender; received notice on Thursday, the 29th May, to summon a jury to try Callender on Monday, 2nd of June. I proceeded to summon them immediately, but did not complete the panel until after the

court had met on Monday. Did not show the panel to Judge Chase, except the panel of the Grand Jury in order to appoint a foreman. Judge Chase never told me to strike off a certain description of people "or creatures" called Democrats. Several gentlemen applied to be excused from serving on the jury. Mr. Lewis and Mr. Blakely applied to me to be discharged; heard Mr. Lewis was prejudiced and discharged him. Mr. Blakeley was under the age of twenty-five, and we let him off. Mr. Samuel Morse applied to be discharged, but I refused. He then told me that he knew I would let him off, and stooping down assured me that he was prejudiced against Callender. I informed him that I would let him off, but requested him not to mention it, least others might feign the same excuse; informed Mr. Pollard that he must serve. He informed me that he had been summoned but could not attend. Told him that there was but one reason which would induce me to excuse him, and he not giving that I refused to discharge him; he then went up to the court and they excused him. Colonel Harvie requested to be let off and informed me that he was high sheriff of Henrico court which was then sitting; told him that the high sheriff generally did nothing at court, and he must serve; he then applied to the court and was released. Mr. Rudford was in court and made some objection to serving. He might have said that he differed in politics with me. When he was called he did not answer. I met Mr. Hay in Petersburg; told him that I had been foiled in my

endeavors to find Callender, but that I was determined to see whether he was not in Petersburg. Mr. Hay appeared to interest himself in persuading me to abandon the pursuit; replied that I should do my duty; said he did not know where Callender was, but that if he did he would not tell me, and added that Callender could not or would not be taken that term; told him that perhaps he was too sanguine and he must not be surprised if I carried Callender to court with me. Mr. Hay said that Callender, if taken, could not be defended and would be imprisoned, but that if not taken at that time at the next court he would surrender himself.

*Cross-examined.* Mr. Mosby, my deputy, told me that Colonel Vandevall was averse to serving; told him that it lay with him to let him off, and he informed me that he had not. Have heard Mr. Vandevall denied that he was summoned. Called Mr. Mosby's attention to it, who said it was unfounded. Have no recollection of seeing Mr. Heath during the session of the court, but upon hearing Mr. Marshall's testimony, suppose I must have seen Mr. Heath in Richmond during the term, as I know him very well; have not the slightest recollection of seeing him at the lodgings of Judge Chase at any time.

*John Marshall.* At the trial of Callender was a member of the bar. Colonel Harvie informed me, that he had been summoned as a juror to try Callender, and expressed great unwillingness to serve; he informed that he was an improper person to serve because he had made up his mind that the sedition law

was unconstitutional, and should therefore find the traverser not guilty, let the evidence be what it might. He requested me to interfere with the marshal, and obtain his discharge; spoke to the marshal and informed him of Colonel Harvie's having made up his mind, and that of course he was an improper person to serve on the jury. The marshal replied that Colonel Harvie must apply to the court, because he had determined to conduct himself in such a manner as to prevent suspicion of prejudice against Callender; applied to the court for Colonel Harvie's discharge on the ground of his being high sheriff of Henrico county, whose court was then sitting; upon this ground he was discharged.

*Cross-examined.* Was present at the trial of Callender. There were several circumstances which do not always occur in trials, both on the part of the bench and bar. The counsel for Callender wished to bring before the jury the question of the constitutionality of the law. This the court determined to be improper, and whenever the counsel attempted to argue it before the jury they were stopped. After being stopped on that point, an argument was commenced on the part of Mr. Hay, to prove to the judge, that he was not correct in the opinion which he had given. Immediately on his commencement the judge stopped him, and told him that what he said was not law. Some conversation ensued between them, and Mr. Hay left the bar.

Have a general impression on the subject, which is, that throughout the course of the trial

when anything was stated which the judge did not think correct, he immediately stated his opinion; but this is also his practice in civil cases. It is usual for a judge, if he believes a case clear, to shorten argument; but if the counsel express a desire to be heard, it is a piece of decorum to hear them.

As to compelling counsel to reduce questions to writing, and submit them to the court, it depends on the circumstances of the case. If doubts are suggested as to the propriety of the question, the judges will do right to have it reduced to writing. But unless there is some particular reason for it, have never known counsel compelled to reduce their questions to writing; have never known questions reduced to writing in the first instance; have never in a criminal prosecution known the testimony of a witness to be rejected, because he was unable to prove all the defense.

*Mr. Randolph.* Did you hear the judge apply the epithet of "young gentleman" to either of the counsel? I think I heard him apply it to Mr. Wirt. How old do you suppose Mr. Wirt was at that time? I suppose he was about thirty, a widower.

*Edmund I. Lee.* Was present at the trial of Callender. Judge Chase informed the counsel that he could not continue the cause, but that if they would fix any time when they supposed they would be ready, he would postpone the trial until that time. He observed that he would postpone it for a fortnight, for a month; am not certain but he added that he would postpone it for six weeks.

*John A. Chevalier.* Was present at the trial of Callender. Did not hear a motion made by the counsel for a continuance of the cause nor an offer on the part of the court to postpone the cause.

*Cross-examined.* Have not been much in the habit of attending courts of justice. Did not observe anything unusual at the trial of Callender.

*Robert Gamble.* Was present when the motion was made for a continuance. The judge observed that the cause could not be continued, but that he would postpone it for a month or even six weeks, or as long as the term would admit. Mr. Basset said that he had seen extracts in a newspaper which were said to be taken from the "Prospect Before Us," and that he had formed an opinion that whoever was the author, he came under the sedition law. Judge Chase asked whether he had made up his mind on the charges in the indictment, to which Mr. Basset replied that he had not, and he was directed to be sworn on the jury. Mr. Basset merely suggested the impressions made on his mind as a scruple of delicacy.

*Cross-examined.* Informed the court that I had not "formed and delivered an opinion upon the charges in the indictment," as I had never seen the indictment nor heard it read; had never seen the Prospect. The court directed me to be sworn.

*Philip Gooch.* Was present at the trial of Callender in Richmond. When Mr. Basset suggested to the court whether he was a fit person to serve on the jury, the court decided that he must not only have formed, but

delivered his opinion also, and Judge Chase proceeded to give some reasons for it, but at the same time he consulted with the associate judge; sat near them and could hear their conversation. Basset was then sworn on the jury. The counsel for the traverser called Colonel John Taylor as a witness. After he was sworn an objection was made to his testimony and Judge Chase declared it inadmissible. He consulted with Judge Griffin, who declared himself to be of the same opinion. Judge Chase then observed that the counsel were men of talents and knew the evidence to be inadmissible, and they wished to alarm the people. He then turned to Mr. Nelson and said: "I wish you would suffer the evidence to go to the jury." Mr. Nelson replied that he could not. Judge Chase asked him a second time, and he said he wished he could, but that it was contrary to law. Mr. Wirt opened the case on the part of the traverser, and said something about the court's prohibiting them. Judge Chase interrupted him and told him that he must not reflect on the court, and he made an apology. Mr. Wirt endeavored to show the jury that the sedition law was unconstitutional, but the court told him that he had no right to argue that question before the jury. Mr. Wirt went on and the judge stopped him. Mr. Wirt said: "I am going on." Judge Chase said: "No, sir; I am going on," and told him to sit down. The judge then delivered a long opinion, and said that the jury were to judge of the law as well as the fact, but not of the constitutionality of the law. Mr. Wirt

said that if the jury had a right to judge of the law, and the constitution was the supreme law, it followed that the jury had a right to decide on the constitutionality of the law. Judge Chase replied that it was a non sequitur, and made a bow, and Mr. Wirt sat down. This produced a considerable degree of merriment. Mr. Nicholas then rose and spoke, and he was not interrupted by the judge. Mr. Hay then followed and was interrupted two or three times by the judge. Mr. Hay then folded up his papers to retire, when Judge Chase said: "Since you are so captious, go on and say what you please;" but Mr. Hay declined going on and retired from the bar. Mr. Wirt appeared hurt when he sat down. Judge Chase told them that they knew the law to be contrary to what they said. I thought the expression rude, because it implied a breach of duty. Judge Griffin concurred in all the opinions delivered by Judge Chase. Judge Chase told Mr. Wirt: "Please sit down, sir."

*David Robertson.* At the trial of Callender I came into court when Mr. Hay made his last motion for a continuance; took down, for my own amusement, the proceedings in short hand; have compared the short hand notes with the printed statement. (Here Mr. Robertson read his statement, which was substantially as set out in the report of the trial of Callender. See 10 Am. St. Tr.)

*Cross-examined.* Have practiced law for more than sixteen years, and am prosecutor in two districts. Most of the misdemeanors which are committed in

those districts are assaults and batteries. The first process is a summons and upon the return of that if the party does not appear then a *capias* issues. Have known cases of felony tried immediately after the presentment was found, but not only think it in the power, but think it the duty of the court to issue what process they conceive to be most proper.

*February 18.*

*William Marshall* (recalled). Have never known the circuit court to adjourn longer than from day to day but once, and that was from a Tuesday to the Saturday following; have never known an instance of an adjournment taking place and another court being held in the intermediate time.

*To Mr. Harper.* Mr. Nelson, the attorney at the time Callender was tried, was opposed to the then administration. There had been two instances of indictment before the trial of Callender, one before Judge Iredell and the other before Judge Wilson, and they both decided that the court would assess the fine. Am prosecutor of the court held in Richmond; recollect a *capias* once to have issued; but the cause was not tried at the first term; have repeatedly tried cases of misdemeanors at the first term. Generally when a motion was made for a continuance I suffered it to take place; but never considered it as a matter of right; recollect an instance where a motion was made for a continuance, and yet the case tried at the first term.

*James Winchester.* It has been a constant practice in Maryland

ever since I have been acquainted with the courts for them to adjourn to any time they thought proper.

*William Rawle.* As to the practice for the circuit courts to adjourn, recollect the subject to have been discussed when Mr. Jay, the then chief justice, presided. Some occasion produced a wish for an adjournment. The judges called me up to the bench and requested me to examine whether they had the power to do it. Examined the act of Congress, and told the court that in my opinion they had a right to adjourn, as the length of their session was not limited by law, and both the judges were of the same opinion.

*Edmund I. Lee.* I have practiced law in Virginia for nine years; have never been public prosecutor; but whenever I have been engaged in a criminal case it was on the side of the defendant. In those courts, the process in cases not capital, and where the party is not proceeded against by way of indictment, is to issue a summons. There are some offenses which are tried solely by the court without the intervention of a jury, such as profane swearing and Sabbath breaking. When the Grand Jury presents an offense in which the fine does not exceed five dollars, a summons issues. There are some offenses which may be prosecuted in the district courts, where the penalty does not exceed twenty dollars, there a summons issues. There are some proceeded against by way of information and there a summons issues; but in the courts in which I practice I have never known a summons to issue for the party to appear

and answer to an indictment for any offense. The practice is, when a person is presented for an indictable offense, for the attorney to send up an indictment and upon its being returned a true bill, a *capias* is ordered to issue upon the indictment. The courts have universally determined that under the words of the law, "other proper process," they had the power to award a *capias*; have known a *capias* to issue in the first instance on an indictment for an assault and battery. A *capias* is the only mode of arrest in Virginia; have never known any other.

*Gunning Bedford.* Was on the bench with Judge Chase at Newcastle, Delaware, in June, 1800. The Grand Jury being charged by Judge Chase, retired. After being there about half an hour they returned into court, and being asked by the clerk whether they had any presentment or bills of indictment, they answered in the negative. The court called upon the attorney to know whether he had any business to lay before the Grand Jury, and the reply was that he had none. The Grand Jury then asked to be discharged. Judge Chase observed that it was not usual to discharge the jury so soon, and turning round immediately to me, he said, "Mr. Bedford, what is your usual practice here, with regard to discharging grand juries." I replied that it depended on the business which they had to do. Judge Chase then addressed himself to the Grand jury and said: "But, gentlemen, I have been informed that you have in this state a seditious printer who is in the constant habit of abusing the government.



His name is—but perhaps I may do injury to the man by mentioning his name. Have you ever attended to this subject?" The Grand Jury answered that they had not. Judge Chase observed that it was their duty to inquire as he had given them the sedition law in charge, and if there was any truth in what had been told him it was their duty to inquire into it. He further observed, that it was high time that these seditious printers should be corrected, that the happiness, honor and prosperity of the country depended on it. He then asked the attorney whether he could procure a file of the printer's papers. Some person at the bar observed that he could. The judge then asked Mr. Read whether he would look over the file and see, by the next morning whether there was anything in them. Mr. Read replied that he would. Judge Chase then told the Grand Jury that they must attend the next morning at ten o'clock. They complained it was a busy season, but the judge said that the business about which he had spoken was important and he could not discharge them. On our way to our lodgings, I observed to Judge Chase, "why my friend, I believe you do not know where you are, the people in this place are not well pleased with the sedition law." Judge Chase replied, "my dear Bedford, no matter where we are or among whom we are, we must do our duty." The next day the Grand Jury reported that they had made no presentment. Judge Chase asked the attorney whether he had found any thing in the file of papers, who replied that he had found nothing except a piece

against the judge himself. Judge Chase replied, "my shoulders are broad enough and I can bear anything against myself, but where there is a violation of the laws, then will I interfere and have the offender punished." The Grand Jury were discharged. The manner of Judge Chase to the attorney was the usual manner of a court to the prosecutor.

*Cross-examined.* Judge Chase generally expresses himself in a warm manner, but I saw nothing unusual in his manner on that day. Judge Chase's expressions were very much in these terms, "perhaps I am going too far, or I may do the man an injury, have you not two printers?" Did not hear Judge Chase observe when speaking of the printer, "that if report did not belie him he came under the sedition law," nor hear him complain that while he could not get any printer indicted in Delaware, that in Virginia he could not only get them indicted but convicted and punished; have some impression on my mind of hearing Judge Chase observe in a public company that it was hard he could not get a single man indicted in Delaware, while he could in every other place; but this observation was not in the language of complaint nor was it made to me, but was made by Judge Chase in a public and in a jocular manner.

*Nicholas Vandyke.* Attended the circuit court held at New-castle on the 27th and 28th of June, 1800, as one of the bar. (His evidence was much the same as that of the other witnesses.) Did not hear anything about a seditious temper which had manifested itself in Delaware. The manner of Judge Chase in speak-

ing to the attorney was his usual manner which is earnest and warm, but there was nothing which appeared uncommon.

*Archibald Hamilton.* Was present at the circuit court held at Newcastle, in June, 1800. Did not hear anything about a seditious temper. There was no expression of that kind used; was sitting by the side of the clerk, directly under Judge Chase, and nothing of that kind could have been said without my hearing it.

*Cross-examined.* There was nothing particular in the judge's manner.

*John Hall.* Was in the circuit court at Newcastle in June, 1800. Did not hear Judge Chase say that a highly seditious temper had manifested itself among a certain description of people in Delaware.

*Samuel P. Moore.* Was in court at Newcastle in June, 1800. Judge Chase asked the attorney whether he had found anything. Mr. Read then laid hold of a file of papers and observed that there was a publication against "his honor." The judge observed that his shoulders were broad enough to bear all their abuse, and that he only complained of their abusing the government. He then discharged the Grand Jury.

*Mr. Harper.* Do you know any circumstances relative to the deposition of Mr. Read? I presume the conversations which I have heard are not evidence, but they are confidential ones, and I hope the court will not oblige me to reveal them.

*Cross-examined.* Do not know anything that will discredit Mr. Read.

*John Montgomery.* This pa-

per is the publication I sent to the press. It is in the American of the 13th of June, 1803.

*William H. Winder.* Was in court in Baltimore, in May, 1803, when a charge was delivered by Judge Chase. After specifying the laws which were to come under the notice of the Grand Jury, Judge Chase begged leave to detain them, while he made some general observations on the state of affairs. He began with some observations on the nature of a republican government, and also went into a discussion of natural rights, which he denied to be true, and said that liberty consisted in equal protection by the laws. He then animadverted on the repeal of the judiciary system, and said that it had a tendency to subvert the independence of the judiciary. He then adverted to some of the state laws—he mentioned the law by which the district judges of the state had been removed from office, and observed that one of the strongest objections to that law was the motives by which it had been enacted, which motives had been animadverted on in Congress in the debate on the repeal of the judiciary system. He then made some allusion to the bill for the repeal of the general court and court of appeals of the state—he said he saw with regret, the sons of some of those men, who had reared the fair fabric, assisting to demolish it—he also spoke against the general suffrage law; believe I have stated my ideas of the charge in as strong language as the judge used. I have never seen any publication of the charge since the first came out. I was, after being summoned, about to look over

all those publications, but upon reflection I conceived that I should be better able to give my ideas of the charge without reading any of them, because they might tend to mislead me. I sat in such a situation that I could hear the whole and did attend particularly to it. The court was held in a tavern, and the members of the bar were seated around tables. I sat about the middle, directly facing the judge. I think the judge read the whole charge; have no recollection that he read a whole sentence without looking at the paper. Did not hear anything about the present administration "being weak and relaxed, and not acting for the public good, but to preserve themselves in unfairly acquired power." Immediately after the delivery of the charge, a conversation took place at the bar concerning it. Some gentlemen complained of it as reflecting on those persons who were engaged in making the laws which had been spoken of in too harsh terms, and the general impression on my mind was, that I heard nothing which could give offense to any person. Judge Chase did not mention the present administration at all; spoke of the degeneracy of sons as a subject of regret.

*James Winchester.* During the charge delivered by Judge Chase at Baltimore, I attended as one of the judges of the court and sat on the left of Judge Chase, and the Grand Jury were on his right. My recollection of the charge does not materially vary from Mr. Winder's. I regretted that this political charge should have been delivered, because I had heard so much said

against them, and was very attentive to what passed. I am very confident that all the political observations made were relative to state regulations, save only the incidental mention of the law of the United States.

The present administration was not mentioned; am sure that if anything of that kind had fallen from Judge Chase, it would have made a strong impression on my mind. Under the former administration, he recommended a support of it; since the change has taken place, he has made no allusion to the administration, but generally recommended a submission to the laws, and support of the government.

It is not the practice in Maryland for counsel to address the jury on the law in criminal cases; have never known but one instance of the kind, and that was a cause in which the secretary of the navy and myself were engaged as counsel. In that case the counsel did address the jury on the law, and a verdict was obtained, contrary to both law and justice. Have never seen counsel address the jury on the law after the opinion of the court was delivered.

*Cross-examined.* Have never known an opinion delivered on a point of law, before the cause was entered into. If I conceived the opinion of the court to be palpably wrong, I suppose I should address the jury on the law, but if the case was doubtful, I should think it improper for the counsel to attempt to argue the law contrary to the opinion of the court.

*February 19.*

*Thomas Chase.* This paper, exhibit No. 8, is in my hand writ-

ing; this book is in my hand-writing also. I copied it by the direction of my father (Judge Chase) from the words, "Before you retire, gentlemen, to your chamber," to the words "that their fathers erected," from a paper in his hand writing, into this book, before the session of the circuit court in the city of Baltimore, in the month of May, 1803.

*Mr. Harper.* This book contains the whole conclusion of the charge delivered by Judge Chase and having proved the book, we shall offer it in evidence to this honorable court.

*Philip Moore.* Judge Chase was in the practice of delivering charges from a book like that, which was in the hand writing of his son, Mr. Thomas Chase; am clerk of the circuit court of Maryland. I believe the judge read the whole charge from a book; did not hear anything said about the present administration.

*Walter Dorsey.* Was in court when the charge was delivered by Judge Chase in May, 1803. Did not hear anything said concerning the present administration. My attention was particularly directed to the charge on account of my seeing an editor present, and expecting that the charge would be the subject of newspaper animadversion. I have not the most distant recollection of anything of that kind having been said. Whether Judge Chase did recommend it to the Grand Jury to use their endeavors to prevent the passage of the law for the abolition of the general court or whether it was only an inference, I am unable to say. The whole of the charge appeared to be read from a book.

*John Purviance.* Was present when the charge was delivered by Judge Chase to the Grand Jury at Baltimore in May, 1803.

I have no recollection of any mention being made of the administration, except so far as they might be connected with the repeal of the judiciary system; have not the slightest impression of any expressions having been used reproachful to the present administration. After the charge was delivered, it was the subject of conversation. I then observed that I disapproved of political charges; but that the sentiments contained in the charge were unexceptional; should not have expressed myself in this manner had the judge's charge contained the expressions which it has been said to have contained. Have always noticed that Judge Chase interrupted counsel very frequent, and I have always attributed it to a quickness of apprehension in the judge. I have remarked with deference to the judge that he frequently wanted patience, and would often interrupt counsel when he conceived the law to be against them, but have noticed that when counsel have, in polite terms, insisted on going on, that he always heard them; have made the remark, that Judge Chase has always manifested a disposition to retract his errors, when convinced of them, almost unparalleled in a judge.

*Nicholas Brice.* Was present in the circuit court at Baltimore, in May, 1803. Did not hear Judge Chase say anything about the present administration being weak and relaxed. Was sitting near Mr. John Stephen, with whom I am very intimate, al-

though we differ in political sentiments; and we had a long talk afterwards concerning the charge, and had any such expressions been used in the charge, I am certain it would have been mentioned, but nothing of that kind was hinted at.

*James P. Boyd.* Was in court when the charge was delivered by Judge Chase in May, 1803. Did not hear Judge Chase say that the present administration was weak and relaxed and not seeking the happiness of the people, but to preserve themselves in unfairly acquired power. Always thought political charges wrong, and if Judge Chase had reflected on the administration, when he is a component part of it, I must have recollected any expressions which he used.

*William McMechen.* Was in court when a charge was delivered by Judge Chase at May term, 1803; have not the smallest recollection of hearing the administration mentioned. After the charge was delivered, met Mr. Montgomery; asked him what he thought of the charge, he replied that "for this, and many other offenses, Judge Chase would be impeached." This caused me to pay some attention to what had been said. Some time after this I met with a publication in the *Anti-Democrat*, which was said to be the charge; examined it with attention, and it did appear to me to be substantially the same which I had heard. That publication did not contain anything about the present administration.

*William I. Govane.* Was in court when the charge was delivered by Judge Chase in May,

1803. Was particularly attentive and I think he read the whole time. Nothing was said about the present administration.

*John Campbell.* Was in court in May, 1803. Was foreman of the jury; recollect the charge; kept my eyes on the judge; he appeared to read the whole time he was delivering it; have a pretty good recollection of the latter part of it. Nothing was said against the present administration; think I would have remembered such expressions had they been used.

*William Cranch.* Was in the circuit court of Baltimore when a charge was delivered by Judge Chase; was not more than fifteen feet from Judge Chase. He held a book in his hand, and appeared to read the charge from it. He often raised his eyes, but I did not observe that he repeated more than part of a sentence without looking at the book. Did not hear any expressions about the present administration.

*Thomas Hall* (in rebuttal). Heard a charge delivered by Judge Chase at a circuit court in Baltimore, in May, 1803; cannot recollect the particular language of Judge Chase, as I paid but little attention to it. Cannot attempt to give the language of Judge Chase. I live remote from him and have never conversed with any person on the subject. Think he spoke concerning the present administration, and my impressions were that he intended to convey the idea that the administration was weak or wicked.

*George Hay* (recalled).

*Mr. Randolph.* Did you endeavor to dissuade the late marshal of Virginia from the execu-

tion of his duty when in pursuit of Callender? I certainly did not—nor did Mr. Randolph intend to convey that idea. Two reasons prevented me; the one with regard to my own character, and the other was that I entertained a better opinion of Mr. Randolph's integrity. You mentioned an opinion to him that Callender had kept out of the way? I did tell him that I thought he would be unable to take him. I understood that Callender had gone to a place where the marshal would not have access; told him Callender would surrender at the next term; was never retained as counsel for Callender; was averse to arguing the cause before Judge Chase. The impressions made on my mind from hearing of his conduct in the cases of Fries and Cooper were that it would be extremely unpleasant for me to appear before him.

I believe that several of the jury lived out of Richmond—my opinion is that they were all opposed to him in political sentiments; do not know the political sentiments of Colonel John Harvie. William Rudford was called a very moderate man. Marks Vandeval has been uniformly regarded as a republican, but not a decided one; never heard of a bill of exceptions being taken in Virginia in a criminal case.

*Cross-examined.* The point I argued in the case of Callender was the constitutionality of the sedition law; candidly confess that I had no hopes of convincing any of the circuit judges, and I had but faint hopes of convincing the jury; but I meant to have argued it to the public; do not

think I stated as a reason to the marshal why I wished Callender not to be tried that term, that he could not be defended, and if tried at the next term there would be the sooner chance for a pardon, but if Mr. Randolph says I did, I know I must have said so.

*David M. Randolph.* Mr. Hay's expressions gave me to understand that Callender could not be defended and that he would surrender at the next term; did believe that he had the idea of a pardon in his mind. I did not, when giving testimony before, mean to convey the idea that Mr. Hay attempted to dissuade me from the execution of my duty.

*Philip Norborne Nicholas.* Recollect the case which came up to the high court of appeals from Winchester of a clerk for bribery. I prosecuted it and Mr. Hay was engaged with me. There were bills of exception in the record. I believe this case was subsequent to the trial of Callender.

*John Montgomery.* When I before delivered in my testimony I said it would not be in my power to state the language used by Judge Chase in his charge. I find I have been misunderstood. I do not pretend to say that Judge Chase made use of the word "administration," nor did he say anything about Mr. Jefferson's administration; but he did say, that the government (or the administration) was weak and relaxed, and that their acts did not flow from a wish to promote the general welfare, but to keep themselves in unfairly acquired power. These were my impressions at the time of the charge, and they are so now.

*Mr. Nicholson.* At the close of

the charge did Judge Chase give to the jury an express charge to prevent the enactment of the law for the abolition of the general court, or was it an inference? It was in express words, not an inference. I will state further that I never had a conversation with any gentleman who heard the

charge, but who coincided in opinion with me as to the latter part. A few days after the charge was published by Judge Chase, I had a conversation with his son, Mr. Samuel Chase, in Mr. Evans' tavern, and I then told him the latter part of the charge had been omitted.

*Mr. Harper* presented the following request from *Judge Chase*:

Mr. President. The state of my health will not permit me to remain any longer at this bar. It is with great regret I depart before I hear the judgment of this honorable court. If permitted to retire, I shall leave this honorable court with an unlimited confidence in its justice; and I beg leave to present my thanks to them for their patience and indulgence in the long and tedious examination of the witnesses. Whatever may be the ultimate decision of this honorable court, I console myself with the reflection that it will be the result of mature deliberation on the legal testimony in the case, and will emanate from those principles, which ought to govern the highest tribunal of justice in the United States.

THE VICE-PRESIDENT said the rules of the court did not require the personal presence of Judge Chase, and that there was no objection to his withdrawing.

*February 20.*

*Philip Stewart.* Was a member of the Grand Jury at Baltimore in May, 1803; have a very imperfect recollection of the charge; did not feel well pleased with a part of the charge; felt hurt at some expressions which were used in allusion to the suf-

frage law, as I had been a member of the legislature at the time the law passed, and voted for it; he used the word "degeneracy;" there was also a recommendation to the Grand Jury to use their influence to prevent the passage of a law for the abolition of the general court.

## THE SPEECHES FOR THE PROSECUTION.

MR. EARLY FOR THE PROSECUTION.

*February 20.*

*Mr. Early.* Mr. President: An officer who has been intrusted by his country to administer to the people a portion of the justice on this side of the grave, stands charged with disregarding the sacred obligations of the constitution, and of staining the pure ermine of justice, by political party spirit. The charges he is now to answer have passed in review before the people, and fixed a foul stigma on the American character. To this honorable court the people through the medium of their representatives, have applied for a vindication of their rights, and dragged the guilty. The first article charges

the respondent with a conduct which strikes at the root of one of the most important privileges of a free people. I mean the right of trial by jury. It is not my intention to deny the right of judges to deliver their opinion on the law to the jury, but it is the most delicate power which they possess, and ought to be exercised with caution. By the constitution of the United States, the accused is to enjoy the right of a trial by an impartial jury. We charge the defendant with having deprived John Fries of the right of having his case determined by an impartial jury. For the respondent did deliver an extrajudicial opinion, and made certain declarations to influence the minds of the jury against the case of Fries.

In the first trial of Fries, Judge Iredell set an example, which Judge Chase ought to have followed; but disregarding all precedents, and setting at naught all examples; the respondent first determined the law, and then prohibits the counsel from arguing it to the jury. Of what avail is the right of the accused to be heard by counsel when his counsel are prohibited from arguing the law on which his defense entirely rests? Of what avail is it, that the jury are invested with the right of deciding the law as well as the fact, if they are to be prohibited from hearing arguments as to the law. The right of the jury to decide the law in criminal cases is as much acknowledged as their right to decide on the facts, and the court have as much power to abridge their rights in one case as in the other; and the accused has as much right to be heard by counsel on the law as he has on the facts.

Was the crime which was committed by the respondent the greater because the opinion was reduced to writing? It was not. The forming and delivering the opinion, in the presence of the jury, tending to influence their decision, was the guilt of the offense, and the evil was completed by the application of the law to the particular case, and the counsel were left to the miserable hope of convincing the judge that he was wrong. If then I were asked, as the counsel were, whether if an error had been committed, it should not be suffered to be corrected, I would answer, that it was an offense that admitted of no atonement. The evil was complete, and repentance came too late. As well might a man who had inflicted a mortal wound, attempt to repent (when he found the person dying) under fear of being punished. The sin committed by the respondent was of such a nature, that it admitted of no repentance. They were permitted to read cases that were law, but not cases that were not law. This is Mr. Rawle's testimony, that common law cases and decisions under the statute of Edward the Third, before the revolution in England, should not be read to the jury; for it will be recollected that the cases mentioned by the judge as improper to be read, were decisions after the statute of Edward the Third, and were made in the reign of Edward the Fourth. I ask the court to look at the consequences of this doctrine. The counsel were permitted to argue the law, but not to read cases that were not law. Who was to determine whether the cases were or were not law? The judge himself, and the right of the jury, was as



much impaired as if the counsel had been prohibited altogether from aruing the law.

The second, third and fourth articles, charge a conduct in the respondent, which forms many grounds of accusation. It is true that in this instance, no person's life was at stake, but other privileges were violated which are equally sacred. In casting our eyes over this transaction, we are struck with a feature not usual in the history of judicial proceedings. We find the respondent proceeding with a determination to convict. We find him endeavoring to bring shame upon the counsel who appeared for Callender. We are met in the outset of this case by the respondent, with a long train of reasoning, but it appears to be the reasoning of a man conscious of impropriety. The test which was adopted to try whether the jurors were impartial, and the manner in which the judge acted, cannot be accounted for on any other principle, than an intention to convict. Upon what other ground can we account for the jurors being asked, whether they had formed an opinion upon what they had never seen; and although every juror might have an opinion which insured the conviction of Callender, yet they were obliged to answer the question in the negative, which was put to them by the respondent. Partiality or prejudice need not be in the case then for trial, in order to prevent a person from serving on the jury. By way of illustration I will put a case of a man who is tried for murder. Suppose there is a dispute as to the fact of killing, whether it amounted to murder or not, and a juror speaking in relation to the killing, express an opinion that such a killing was murder. I ask whether such a declaration would not be a disqualification, certainly it would. The present case is equally as strong. Although Mr. Basset did not declare that Callender was guilty, yet he did say so in fact, for he declared that he had formed an "unequivocal opinion," "that the author of 'The Prospect Before Us,' came under the sedition law." And it was well known that it was for the publication of that book, that Callender was indicted.

We are next to examine a part of it, in which human invention may be tortured in vain for palliation, this is the rejection of Colonel Taylor's evidence. The charge in the indictment which he was called to give evidence on, must have constituted distinct offenses, but one charge might have consisted of several facts. We have two views of this subject, the one to be found in the testimony the other in the answer. We learn from the testimony, that the respondent rejected the evidence of Colonel Taylor because it did not go to prove the truth of the whole charge. I take it that the charge which Colonel Taylor was to prove, was a distinct offense, and that his evidence ought not to have been rejected on the ground assigned by the respondent. In a case of murder, the defense may depend on many things. Was it ever heard of before, that a witness was rejected because he was unable to prove the whole of the defense? I believe not.

The fourth article accuses the respondent of partiality. The constitution provides that the accused shall have compulsory process

to compel the attendance of his witnesses, of no avail is this privilege unless time is allowed for the witnesses to attend. Of what avail is it to say, that process shall issue to compel the attendance of witnesses, when the party is forced to trial before the process can be returned? This is worse than mockery, it is high treason against the majesty of the constitution. Callender was indicted, tried, convicted and punished whilst his witnesses were absent. Shall we be asked for proofs of corrupt intent in the respondent? It is on all hands admitted, that he yields to none in legal learning and abilities, and is possessed of talents, which might adorn the tribunals of any country. Then I ask, whether on a question so simple, he could have erred without intention? I answer, no sir. Can it be supposed that every thing was done to stifle the defense of the accused, and yet the judge be free from corrupt intention. Let gentlemen look at the testimony and they will find damning proofs of an intention in the respondent, to oppress, and produce the conviction of Callender.

The fifth and sixth articles, are founded on grounds so simple, that I will not take up the time of the court in discussing them, but will proceed to the seventh. This article charges a conduct in the respondent, than which, nothing could tend more to tarnish his official character. The constitution and laws of the United States, have intended that all judges should be impartial dispensers of justice. In criminal cases, it was intended that they should stand aloof from prejudice, but Judge Chase in this transaction, became a hunter after accusation. Disregarding his high judicial station, he becomes the procurer of prosecution. Surely his thirst for punishment must have been great, when he could not await the tardy movements of the public prosecutor and of the grand jury. If, Mr. President, our judges are to turn informers, and seek after prosecution, then must this country become the nursery of oppression. I shall not make many observations on the eighth article. I consider it of peculiar importance as it exhibits the general spirit of the respondent. It places the respondent in a grand situation. We have heretofore seen his power only extended to individuals, but on this occasion, we behold his gigantic genius raising him to a surprising height, and whole governments subject to his wrath. Both of the acts of the State of Maryland and of the United States, are exposed to the whip and the rack. There is no truth more sacred, than the language of the eighth article, that "without public harmony there can be no public happiness." What language can describe the conduct of a judge who attempts to destroy the respect which the people entertain for the acts of both the state and general governments. It was not sufficient that a person sitting in the judgment seat of the nation, converted it into a forum to pronounce philippics against the state in which he sat as judge; but the Congress of the United States must be held up to view as the sacrilegious violators of the constitution of their country. Mr. President, I have done, and in conclusion, will observe, that in my opinion, we have established against the respondent, a volume of guilt,

every page of which calls aloud for vengeance. I shall leave the cause of the respondent, in hands where there will be a different measure of justice than he is wont to mete to others, and where it will be administered without respect to persons.

MR. CAMPBELL FOR THE PROSECUTION.

*Mr. Campbell.* Mr. President, and Gentlemen of the Senate: It has been the exertion of all governments who regard the liberties of the people to guard against the abuse of power by calling on those to whom it is entrusted, to give an account of the manner in which they have executed their trust. For this purpose the trial by impeachment was early resorted to in England. More than five hundred years ago, the representatives of the people in that nation, called upon the highest officers to account for their conduct, and to be punished for a violation of the law. The trial by impeachment is a peculiar favor to the accused, because the highest tribunal in the nation cannot be influenced, and party spirit will always be laid aside. In the view which I shall take of this subject, it will be proper first to notice the provisions relative to impeachment, and to show how far they apply to the present accusation. In the constitution of the United States it is said, "that the Senate shall have the sole power of trying all impeachments." Here let me observe, that the wisdom of the framers of the constitution is plain discovered in this section. The highest and most enlightened tribunal in the nation, is charged with the protection of the people, and to protect against those whom they themselves had elevated to power, and of whom they had once entertained so favorable an opinion. No inferior tribunal is allowed to try an officer of the government, and judges are placed out of the reach of suspicion. But the "judgment in cases of impeachment cannot extend farther than a removal from office, and a disqualification to hold an office of honor, trust or profit, under the United States." Here the constitution makes an evident distinction between such crimes as are punishable by impeachment, and those punishable by indictment. So far as the offense of the officer is injurious to society, and calculated to endanger the lives and liberties of the people, so far is he impeachable before this tribunal, and not elsewhere. But where an indictment will lie for the offense, there an impeachment will not. An impeachment is a kind of inquest, to examine in what manner the officers have discharged their duty. It is not therefore necessary that the offense should be an indictable one, to render it a subject of impeachment, but that the officer has abused the trust reposed in him and endangered the liberties of the people. The mode of proceeding in the cases of impeachment and indictment clearly shows the distinction between them. In the former no process issued to take the party into custody, but merely a summons for him to appear at the bar of this court, to answer the charges. This plainly evinces, that it is not considered a criminal accusation. In cases in courts of ordinary jurisdiction, the personal attendance of

the party accused is necessary, but in this case it is not. Either there must be a distinction between the offenses, or this monstrous absurdity is involved; that a man may be punished twice for the same offense, first by impeachment and then by indictment. It must I think appear evident to every gentleman who hears me, that the distinction does exist between impeachable and indictable offenses; and that when the constitution declares that the officer may be proceeded against by indictment, it must mean in offenses not impeachable. And that an impeachment lies for an abuse of the power entrusted to an officer, and done in his official capacity, and punishable by this tribunal; and an indictment lies for something not done in his official capacity, and to be tried in a court of ordinary jurisdiction.

The fifth and sixth articles I shall leave to those of my colleagues who are better acquainted with the subject than I am. The two last articles shall be relied upon by me to show the motives of the judge. In examining the first article I rely on the following positions: that Fries was entitled to the benefit of his counsels being heard on the law as well as the fact, without being subject to the restrictions imposed on them by the judge. That the judge by delivering his opinion, did virtually prevent the counsel from arguing the case. And that he did impose restrictions unknown before, and then that those actions could only spring from corrupt motives, and a disposition in Judge Chase to oppress all those who came before him for trial who differed in political opinions with him.

The constitution provides "that the accused shall have the benefit of counsel for his defense." Of what benefit will counsel be when an opinion is delivered before they are heard. Of what benefit can counsel be when they are to be subject to the arbitrary rules of the court? The judge by delivering an opinion, did virtually prevent the counsel from arguing the case. We do not charge that the opinion was erroneous, but that the judge decided without hearing counsel, and prevented the counsel from being heard, thereby depriving the prisoner of his constitutional right.

My third position is "that the judge did impose arbitrary restrictions on the counsel for Fries." This position is clearly established by the testimony of Mr. Lewis and Mr. Dallas. Mr. Lewis declared in his evidence, that Judge Chase said, "that in a former trial, great waste of time had taken place in reading common law authorities and decisions under the statutes of England, before their revolution, and also the statutes of the United States, and that it should not take place again." The Judge states that he presumes that common law authorities could not throw any light on the law of treason. But Mr. Lewis states, that the object they had in view was not to show that the courts of the United States were bound by those decisions, but to show that the courts in England had since the revolution considered themselves bound by the decisions before the revolution, and that as the attorney for the United States was suffered to read the decisions of the courts since the revolution, they wished to show to what an extent constructive treason had been carried before the revolution, and that those decisions had influ-

ence on the judges who made decisions after the revolution, and that therefore none of the decisions in England with regard to treason, were binding on the courts of the United States. This was an object of importance; but the counsel were deprived of this right, and they were also told that they must not cite the statutes of the United States, although some of the witnesses have denied this, yet Mr. Lewis, states positively, that this was done. Is it then considered to be the usages of our courts, that the statutes of Congress are not to be read in the courts, in order to show that what was charged to be treason, was only sedition. This was a direct violation of the right of the prisoner and of the counsel. I beg leave to lay down as a rule, that when a man violates the laws of his country, improper motives must be presumed, and it rests on him to show the purity of motives either by evidence or by circumstances. The Judge says, that if he were mistaken in the law, he could not be considered as liable to punishment. Sir, ignorance of the law cannot be offered as a justification. The known talents of the respondent precludes the idea that he acted from ignorance. But it is insisted that the Judge on the next day withdrew the opinion which he gave on the first day, and gave full liberty to the counsel to proceed with the defense. This permission came too late; the act was completed, the opinion had been delivered, and the impressions made on the minds of the jury; and the withdrawing of the opinion answered no good purpose. As well might the judge say after having scattered fire brands over the country, that he ought to be forgiven, because he had withdrawn the instrument that first caused the conflagration.

The Judge in his answer says, that he cannot be impeached unless the offense be an indictable one. I will refer to the exposition which I attempted to give before in order to show that this is not correct, and in order to show that they are separate and distinct offenses. In 2nd Bacon's abridgment, and Jacob's Law Dictionary, it will be found that the defense of the Judge is not tenable.

*February 21.*

*Mr. Campbell.* I will now proceed to examine the second part of the accusation, which relates to the conduct of the Judge at the trial of Callender. In order to find out the motives of the Judge, let us advert to his conversations previous to the trial. The intended prosecution was first talked of at Annapolis. There the Judge is found with the book in his possession, and declaring that he would punish Callender if there was an honest jury in the State of Virginia. In the stage on his way to Richmond, we find the Judge denouncing the defendant. After the indictment was found, the panel of the jury is presented to him; he inquires whether there are any creatures called Democrats on it, and orders them to be struck off. I will now examine refusal to continue the case. Callender, the defendant, filed an affidavit, stating the absence of material witnesses. I will take the liberty of citing a short case on the subject of continuance. It is from Foster's Crown Law, p. 2, where a special commission had issued to the court to try persons

charged with the crime of high treason, and upon an affidavit made that there were absent witnesses who were material, the court granted sufficient time for their appearance. From this case it will appear, that in England an affidavit similar to the one filed in the case of Callender is deemed sufficient to continue the cause. But the affidavit of Callender was stronger than the one reported in Foster. Judge Chase must therefore have acted contrary to the laws and known usages of our country. But the Judge in his answer says the affidavit was not sufficient, inasmuch as it did not state that the witnesses could prove the truth of all the charges. Can any principle of law justify the position, that the defendant, before he can entitle himself to a continuance, must prove to the Judge, what he expected to prove to the jury? The refusal to continue the case, is to my mind, an evidence of the spirit by which the Judge was actuated during the whole trial, which was to convict Callender; and he was determined to bear down all opposition to this favorite object.

The second article of impeachment relates to the conduct of the Judge in overruling the objection of Mr. Basset, the juror. I shall endeavor to show that Basset was an illegal juror on two grounds: first because he had made up an opinion and was not indifferent, and secondly, that according to the question propounded by the Judge himself, Mr. Basset ought not to have been sworn on the jury. The evidence of Mr. Basset was that he had seen extracts which were said to be taken from the "Prospect Before Us," and had formed an unequivocal opinion that they came under the sedition law. Basset clearly knew that the indictment against Callender was founded on the book called the "Prospect Before Us," and he therefore had formed an opinion against Callender, and did not stand indifferent. The reason assigned by the Judge for overruling the objection of Mr. Basset was, that he had not formed and delivered an opinion upon the charges in the indictment. Once establish this doctrine, and (as the respondent did) refuse to suffer the indictment to be read to the jurors, and no juror can be disqualified.

The Judge says, that all men had made up their opinions against such notorious offenders as Callender, and that had not the objections of Mr. Basset been overruled, that it would have been impossible to have obtained a jury. But, sir, there is a better reason, which can be offered for the conduct of the respondent. He had determined that Callender should be convicted, and knowing the character and politics of Mr. Basset, he did not wish that he should be excused, and therefore overruled his objections.

The next article, relates to the rejection of Colonel Taylor's testimony. I admit that a court can control improper questions, but they have no right to decide whether it will prove the whole of the charge or not, for this is the province of the jury to determine. Of this right Judge Chase deprived the jury in the case of Callender. If this conduct is correct, the trial by jury is a phantom, and we may well recommend to the government to strike off this incumbrance.

On the fourth article it appeared to be the intention of the Judge to prevent the counsel from exerting themselves in Callender's favor. Before he left Annapolis he declared that he would teach the bar of Virginia the difference between liberty and the licentiousness of the press. In Richmond we find the Judge carrying this threat into effect. He treated the counsel for Callender, as mushrooms of the day, and in derision, called them "boys"; in the whole of his conduct towards them he was witty and satirical. Sir, the rights and liberties of the citizen are too serious to be a subject of jest. The conduct of the Judge was intended to turn the counsel into ridicule, but the injury resulted to the defendant, for the counsel having their character at stake, withdrew from his defense, and he was condemned without their assistance.

As to the conduct of the Judge, as charged in the seventh article, it appears to be strongly marked with that political intolerance, that the whole course of this proceeding seemed to evince. He descended from the dignity of his office, in order to procure the punishment of a person of different political sentiments from himself. The eighth article is concerning a similar conduct. He there is charged, and the charge is substantiated, with attempting to alarm the public mind and destroy the confidence of the people in the government. Instead of a person of different political sentiments having justice done him by Judge Chase, he is merely brought before him for the purpose of conviction. Is this a character fit to occupy a seat on the bench? No, he is not. The streams of justice ought to flow as clear as the sunbeams of the morning. A man ought to come before the court with confidence that he will have justice.

MR. CLARKE FOR THE PROSECUTION.

*Mr. Clarke.* Mr. President: I will make a few remarks upon the fifth and sixth articles, in order that the case may be fully opened. The practice under the law of Virginia, has been attempted to be proved by the memory of counsel. That is too erring a standard for us to be regulated by. The process is generally directed by the court and the clerk, and this accounts for the seeming difference in the practice. It is admitted that the process issued against Callender was justifiable by the practice of other States, but the federal courts sitting in Virginia, are expressly bound by the laws of that State, which directs that in all cases not capital, "a summons or other proper process shall issue." If we attend to the duty of the Grand Jury, we shall find a clear exposition of the words other "proper process." The Grand Jury are by the laws of Virginia, to present persons for "murder, felony, or other misdemeanors." In my opinion this plainly shows, that the words "other proper process," apply to process similar to a summons. It has been said that the counsel for Callender, did not suggest this law of Virginia. Mr. President, the counsel were not employed when the process issued, and had nothing to do with it. But whether a

*capias* or a summons is issued, the law expressly orders that it shall be returnable to the next term. This also is the practice in the courts in England, as will be found by a reference to Hawkins. If it were not the business of the Judge to have known the laws of Virginia, he was bound to know the laws of England. Even had he looked there, he would have seen that a *venire facias*, which is in the nature of a summons, is the proper process, and that it is returnable to the next court. But the Judge has stated, that ignorance of the law is excusable in him. Had he not have been acquainted with the law in this particular, he ought not to have proceeded with so much precipitancy. On Saturday morning the presentment was found, and the process was issued immediately, without even waiting for an indictment. This can only be accounted for by the suspicion, that the Judge had gone to Richmond, with a determination to convict Callender, and had acted with degradation to his high official station, and issued process contrary to law. Having thus stated the law on the fifth and sixth articles, I have only to observe, that the opening of the prosecution is fully closed.

MR. HOPKINSON'S SPEECH FOR THE DEFENSE.

*February 22.*

*Mr. Hopkinson:* Mr. President. We cannot remind you and this honorable court, as our opponents have so frequently done, that we address you in behalf of the majesty of the people—we appear for an ancient and infirm man, whose better days have been worn out in the service of that country which now degrades him, and who has nothing to promise you for an honorable acquittal but the approbation of your own consciences; we are happy however to concur with the honorable Managers in one point; I mean, the importance they are disposed to give to this cause. In every relation and aspect in which it can be viewed, it is indeed of infinite importance. It is important to the respondent, to the full amount of his good name and reputation, and of that little portion of happiness the small residue of his life may afford. It is important to you, senators and judges, inasmuch as you value the judgment which posterity shall pass upon the proceedings of this day; it is important to our country as she estimates her character, for sound, dignified and impartial justice, in the eyes of a judging world. The little, busy vortex, that plays immediately round the scene of action, considers this proceeding merely as the trial of Judge Chase and gaze



upon him as the only person interested in the result. This is a false and imperfect view of the case—it is not the trial of Judge Chase alone—it is a trial between him and his country; and that country is as dearly interested as the Judge can be, in a fair and impartial investigation of the case, and in a just and honest decision of it. There is yet another dread tribunal to which we should not be inattentive—we should look to it with solemn impressions of respect—it is posterity—the race of men that will come after us—when all the false glare and false importance of the times shall pass away—when things shall settle down into a state of placid tranquility, and lose that bustling motion which deceives with false appearances—when you, most honorable senators, who sit here to judge, as well as the respondent who sits to be judged, shall alike rest in the silence of the tomb, then comes the faithful, the scrutinizing historian, who without fear or favor will record the transaction; then comes a just and impartial posterity, who without regard to persons or to dignities, will decide upon your decision—then, I trust, the high honor and integrity of this court will stand recorded in the pure language of deserved praise, and this day will be remembered in the annals of our land as honorable to the respondent, to his judges, and to the justice of our country.

In England the impeachment of a judge is a rare occurrence; I recollect but two in half a century—but in our country, boasting of its superior purity and virtue, and declaiming ever against the vices, venality and corruption of the old world, seven judges have been prosecuted, criminally, in about two years—a melancholy proof, either of extreme and unequaled corruption in our judiciary, or of strange and persecuting times among us.

The first proper object of our inquiry in this case, is to ascertain with proper precision what acts or offenses of a public officer are the legal objects of impeachment. This question meets us at the very threshold of the case. If it shall appear that the charges exhibited in these articles of impeachment are not, even if true, the constitutional subjects of impeachment, if it shall turn out, on the investigation, that the

judge has really fallen into error, mistake or indiscretion, yet if he stands acquitted in proof of any such acts as by the law of the land are impeachable offenses, he stands entitled to his discharge of his trial. This proceeding by impeachment is a mode of trial created and defined by the constitution of our country; and by this the court is conclusively bound. To the constitution then we must exclusively look to discover what is or is not impeachable. We shall there find the whole proceeding distinctly marked out; and every thing, designated and properly distributed, necessary in the construction of a court of criminal jurisdiction. We shall find: 1. Who shall originate or present an impeachment. 2. Who shall try it. 3. For what offenses it may be used. 4. What is the punishment on conviction. The first of these points is provided for in the second section of the first article of the constitution, where it is declared, that "the house of representatives shall have the sole power of impeachment." This power corresponds with that of a grand jury to find a presentment or indictment. In the third section of the same article, the court is provided, before whom the impeachment thus originatel shall be tried. "The senate shall have the sole power to try all impeachments." And the fourth section of the second article points out and describes the offenses intended to be impeachable, and the punishment which is to follow conviction; subject to a limitation in the third section of the first article.

Have any facts then been given in evidence against the respondent which makes him liable to be proceeded against by this high process of impeachment? What are the offenses? What is the constitutional description of those official acts for which a public officer may be arraigned before this high court. In the fourth section of the second article of the constitution, it is declared, that "the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of treason, bribery or other high crimes and misdemeanors." Treason or bribery is not alleged against us on this occasion; our offenses must come under the general description of "high crimes and misdemeanors," or we are not impeachable by the constitution

of the United States. I offer it as a position, I shall rely upon in my argument, that no judge can be impeached and removed from office for any act or offense for which he could not be indicted. It must be by law an indictable offense. One of the gentlemen indeed who conducts this prosecution (Mr. Campbell) contends for the reverse of this proposition, and holds that for such official acts as are the subject of impeachment no indictment will lie or can be maintained. For, says he, it would involve us in this monstrous oppression and absurdity, that a man might be twice punished for the same offense; once by impeachment, and then by indictment—and so most surely he may; and the limitation of the punishment on impeachment takes away the injustice and oppression the gentleman dreads: a slight attention to the subject will show the fallacy of this gentleman's doctrine. If the absurdity and oppression he fears will really ensue, on indicting a man for the same offense for which he has been already impeached, they must be charged to the constitution itself; which in the third section of the first article, after limiting the extent of the judgment, in cases of impeachment, goes on to declare, that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law." The idea of the honorable Manager is, that for acts done in the course of official duty, a judge must be proceeded against exclusively by impeachment; and that no indictment will lie in such a case. The incorrectness of this notion appears not only from a reference to the constitution, but to the known law of England also. I will remind you of a case, stated I believe in the elementary books of the law, in which it is said, that if a judge undertakes of his own authority to change the mode of punishment prescribed by law for any crime, he is indictable: for instance, should he sentence a man to be beheaded where the law directed him to be hanged, the judge is guilty of murder, and may be accordingly indicted. When, sir, I contend that in order to sustain an impeachment, an offense must be proved upon the respondent which would support an indictment, I do not mean to be understood as admitting that the converse of the proposi-

tion is true; that is that every act or offense is impeachable which is indictable—far from it: a man may be indictable for many violations of positive law, which evince no malamens, no corrupt heart, or intention, but which could not be the ground of impeachment. I will instance the case of an assault, which is an indictable offense, but will not surely be pretended to be an impeachable offense for which a judge may be removed from office. It is true that the second section of the first article, which gives the house of representatives the sole power of impeachment, does not in terms limit the exercise of that power; but its obvious meaning is, not in that place, to describe the kind of acts which are to be subjects of impeachment, but merely to declare in what branch of the government it shall commence. The house of representatives has the power of impeachment, but for what they are to impeach, in what cases they may exercise this delegated power, depends on other parts of the constitution, and not on their opinion, whim or caprice. The whole system of impeachment must be taken together, and not in disjointed parts; and if we find one part of the constitution declaring who shall commence an impeachment, we find other parts of it declaring who shall try it, and what acts and what persons are constitutional subjects of this mode of trial. The power of impeachment is with the house of representatives; but only for impeachable offenses: they are to proceed against the offense in this way when it is committed, but not to create the offense, and make any act criminal and impeachable at their wish and pleasure. What is an offense is a question to be decided by the constitution and the law, not by the opinion of a single branch of the legislature; and when the offense thus described by the constitution or the law has been committed, then and not until then, has the house of representatives power to impeach the offender. So a grand jury possesses the sole power to indict, but in the exercise of this power they are bound by positive law, and do not assume under this general power to make any thing indictable which they might disapprove; if it were so, we should indeed have a strange, unsettled and dangerous penal code. No man could walk in safety, but

would be at the mercy of the caprice of every grand jury that might be summoned; and that would be crime tomorrow which is innocent today.

What part of the constitution then, declares any of the acts charged and proved upon Judge Chase, even in the worse aspect, to be impeachable. He has not been guilty of treason or bribery; he is not charged with them. Has he then been guilty of "other high crimes and misdemeanors." In an instrument so sacred as the constitution, I presume, every word must have its full and fair meaning; it is not then only for crimes and misdemeanors that a judge is impeachable, but it must be for high crimes and misdemeanors; although this qualifying adjective "high" immediately precedes and is directly attached to the word crimes, yet from the evident intention of the constitution, and upon a just grammatical construction, it must be also applied to "misdemeanors"—the repetition of this adjective, would have injured the harmony of the sentence, without adding any thing to its perspicuity. How could this be in common parlance? Suppose it should be said that at this trial there are attending many ladies and gentlemen; would it be doubted that the adjective "many" applies to gentlemen as well as ladies, although not repeated? Or if there is any thing peculiar in this respect, in this word "high" I will suppose it were said that among the auditors there are men of high rank and station; would it not be as well understood as if it were said that men of high rank and high station are here? There is surely no difference. So in the constitution it is said that "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." Is not the account to be regular as well as the statement? I should have deemed it unnecessary to have spent a word on so plain a point, had I not understood that a difficulty would probably be made upon it. If my construction of this part of the constitution be not admitted, and the adjective "high" be given exclusively to "crimes" and denied to "misdemeanors," this strange absurdity must ensue. That when an officer of the government is impeached for a crime, he cannot be convicted

unless it proves to be a high crime; but he may nevertheless be convicted of a misdemeanor of the most petty grade.

Observe, sir, the crimes with which these "other high crimes and misdemeanors," are classed in the constitution, and we may learn something of their character. They stand in connection with, treason and bribery, tried in the same manner and subject to the same penalties; but if we are to lose the force and meaning of the word high in relation to misdemeanors, and this description of offense must be governed by the mere meaning of the term "misdemeanor," without deriving any grade from the adjective, still my position remains unimpaired; that the offense whatever it is which is the ground of an impeachment, must be such a one as would support an indictment. "Misdemeanor" is a legal and technical term, well understood and defined in law; and in the construction of a legal instrument, we must give to words their legal significations; a misdemeanor, or a crime, for in their just proper acceptation they are synonymous terms, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. By this test, let the conduct of the respondent be tried, and by it, let him stand justified or condemned.

Does not sir, the court, provided by the constitution for the trial of an impeachment, give us some idea of the grade of offenses intended for its jurisdiction. Look around you, sir, upon this awful tribunal of justice, is it not high and dignified, collecting within itself the justice and majesty of the American people? Was such a court created? Does such a court sit to scan and to punish petty errors and indiscretions, too insignificant to have a name in the penal code, too paltry for the notice of a court of quarter sessions? This is indeed employing an elephant, to remove an atom too minute for the grasp of an insect. Is the senate of the United States, solemnly convened and held together in the presence of the nation, to fix a standard of politeness in a judge, and mark the precincts of a judicial decorum?

The honorable gentleman who opened the prosecution (Mr. Randolph) has contended for a contrary doctrine, and holds

that many things are impeachable which are not indictable. To illustrate his principle, he stated the cases of habitual drunkenness and profane swearing on the bench, what he held to be objects of impeachment and not of indictment. I do not desire to impose my opinion on this court as of any value; but surely I could not hesitate to say that both of the cases put by the gentleman would be indictable. Is there not known to us a class of offenses, not provided for indeed by the letter of any statute, but what came under that general protection which the law gives to virtue, decency, and morals in society. Any act which is *contra bonos mores*, is indictable as such; and it is so, not by act of congress, but by the pure and wholesome mandates of that common law which some men would madly drive from our jurisprudence, but which I most sincerely pray may live forever.

If I am correct in my position that nothing is impeachable that is not also indictable; for what acts then may a man be indicted? May it be on the mere caprice or opinion of any ten, twenty, or one hundred men in the community; or must it not be on some known law of the society in which he resides? It must unquestionably be for some offense, either of omission or commission against some statute of the United States; or some statute of a particular state; or against the provisions of the common law. Against which of these has the respondent offended? What law of any of the descriptions I have mentioned has he violated? By what is he to be judged, by what is he to be justified or condemned, if not by some known law of the country? And if no such law is brought upon his case, if no such violation rises on the day of trial in judgment against him, why stands he here at this bar as a criminal? Whom has he offended? The House of Representatives. And is he impeached for this? I maintain, as a most important and indispensable principle, that no man should be criminally accused, no man can be criminally condemned, but for the violation of some known law by which he was bound to govern himself.

Nothing is so necessary to justice and to safety, than that the criminal code should be certain and known. Let the

judge as well as the citizen, precisely know the path he is to walk in, and what he may or may not do; let not the sword tremble over his unconscious head, or the ground be spread with quicksands and destruction, which appears fair and harmless to the eye of the traveler. Can it be pretended there is one rate of justice for a judge, and another for the private citizen; and that while the latter is protected from surprise, from the malice or caprice of any man or body of men, and can be brought into legal jeopardy only by the violation of laws, before made known to him, the former is to be exposed to punishment without knowing his offense; and the criminality or innocence of his conduct, is to depend not upon the laws existing at the time, but upon the opinions of a body of men, to be collected four or five years after the transaction. A judge may thus be impeached and removed from office, for an act strictly legal when done, if any house of representatives for any indefinite time after shall, for any reason they may act upon, choose to consider such act improper and impeachable.

The constitution, sir, never intended to lay the judiciary thus prostrate at the feet of the house of representatives, the slaves of their will, the victims of their caprice. The judiciary must be protected from prejudice and varying opinion, or it is not worth a farthing. Suppose a grand jury should make a presentment against a man, stating, that most truly he had violated no law or committed any known offense; but he had violated their notions of common sense, for this very standard of impeachment the gentleman who opened gave us; he had shocked their nerves or wounded their sensibility. Would such a presentment be received or listened to for a moment? No, sir; and on the same principle, no judge should be put in jeopardy, because the common sense of one hundred and fifty men may have been shocked by his conduct, or their notions of propriety disturbed. The common sense of some other one hundred and fifty men might approve what is thus condemned, and the rule of right, the objects of punishment or praise, would thus shift about from day to day. Are we to depend upon the house of repre-



sentatives for the innocency or criminality of our conduct? Can they create offenses at their will and pleasure, and declare that to be a crime in 1804, which was only an indiscretion or pardonable error, or perhaps, an approved proceeding in 1800. If this gigantic house of representatives by the usual vote, and in the usual form of legislation, were to direct that any act heretofore not forbidden by law, should hereafter become penal, this declaration of their will would be a mere nullity, would have no force or effect, unless duly sanctioned by the concurrence of the senate and the approbation of the president. Will they then be allowed in the exercise of their power of impeachment, to create crimes and inflict the most serious penalties on actions never before suspected to be criminal, when they could not have swelled the same act into an offense in the form of a law. If this be truly the case, if this power of impeachment may be thus extended without limit or control, then indeed is every valuable liberty prostrated at the feet of this omnipotent house of representatives—and may God preserve us. The president may approve and sign a law, or may make an appointment which to him may seem prudent and beneficial, and it may be the general, nay the universal sentiment that it is so, and it is undeniable that no law is violated by the act; but some four or five years hence there comes a house of representatives, whose common sense is constructed on a new model, and who either are or affect to be, greatly shocked at the atrocity of this act. The president is impeached. In vain he pleads the purity of his intention, the legality of his conduct; in vain he avers that he has violated no law and been guilty of no crime. He will be told, as Judge Chase now is, that the common sense of the house is the standard of guilt, and their opinion of the error of the act, conclusive evidence of corruption. We have read, sir, in our younger days, and read with horror, of the Roman emperor, who placed his edicts so high in the air that the keenest eye could not decipher them, and yet severely punished any breach of them. But the power claimed by the house of representatives to make anything criminal at their pleasure,

at any period after its occurrence, is ten thousand times more dangerous, more tyrannical, more subversive of all liberty and safety. Shall I be called to heavy judgment now, for an act which, when done was forbidden by no law and received no reproach, because in a course of years there is found a set of men, whose common sense condemns the deed? The gentlemen have referred us to this standard, and being under the necessity to acknowledge that the respondent has violated no law of the community, they would, on this vague and dangerous ground accuse, try and condemn him. The code of the Roman tyrant was fixed on the height of a column where it might be understood with some extraordinary pains; but here, to be safe, we must be able to look into years to come, and to foresee what will be the changing opinions of men on points of decorum and propriety for years to come. The rule of our conduct by which we are to be judged and condemned, lies buried in the bosom of futurity, and in the minds and opinions of men unknown, perhaps unborn.

The pure and upright administration of justice, sir, is of the utmost importance to any people. The other movements of government are not of such universal concern. Who shall be president or what treaties or general statutes shall be made, occupies the attention of a few busy politicians; but these things touch not, or but seldom, the private interests and happiness of the great mass of the community. But the settlement of private controversies; the administration of law between man and man; the distribution of justice and right to the citizen in his private business and concern comes to every man's door, and is essential to every man's prosperity and happiness. Hence I consider the judiciary of our country most important among the branches of government, and its purity and independence of the most interesting consequence to every man. Whilst it is honorably and fully protected from the influence of favor or fear from any quarter, the situation of a people can never be very uncomfortable or unsafe; but if a judge is forever to be exposed to prosecutions and impeachments for his official conduct on the mere suggestions of caprice and to be condemned by the mere

voice of prejudice, under the specious name of common sense, can he hold that firm and steady hand his high function requires—no; if his nerves are of iron they must tremble in so perilous a situation. In England the complete independence of the judiciary has been considered, and has been found, the best and surest safeguard of true liberty; securing a government of known and uniform laws, acting alike upon every man. It has, however, been suggested by some of our newspaper politicians, perhaps from a higher source, that although this independent judiciary is very necessary in a monarchy to protect the people from the oppression of a court, yet that, in our republican institution, the same reasons for it do not exist; that it is indeed inconsistent with the nature of our government that any part or branch of it should be independent of the people from whom the power is derived; and as the house of representatives come most frequently from this great source of power, they claim the best right of knowing and expressing its will; and of course the right of a controlling influence over the other branches. My doctrine is precisely the reverse of this. If I were called upon to declare whether the independence of judges were more essentially important in a monarchy or a republic, I should certainly say, in the latter. All governments require, in order to give them firmness, stability and character, some permanent principle; some settled establishments. The want of this is the great deficiency in republican institutions; nothing can be relied upon; no faith can be given either at home or abroad to a people whose systems and operations and policy are constantly changing with popular opinion; if, however, the judiciary is stable and independent; if the rule of justice between men rests on permanent and known principles, it gives a security and character to a country which is absolutely necessary in its intercourse with the world, and in its own internal concerns. This independence is further requisite as a security from oppression. History demonstrates from page to page, that tyranny and oppression have not been confined to despotisms, but have been freely exercised in republics both ancient and modern; with this difference;

that in the latter the oppression has sprung from the impulse of some sudden gust of passion or prejudice, while in the former it is systematically planned and pursued as an ingredient and principle of the government; the people destroy not deliberately, and will return to reflection and justice, if passion is not kept alive and excited by artful intrigue; but while the fit is on, their devastation and cruelty is more terrible and unbounded than the most monstrous tyrant. It is for their own benefit and to protect them from the violence of their own passions, that it is essential to have some firm, unshaken independent branch of government, able and willing to resist their frenzy; if we have read of the death of Seneca under the ferocity of a Nero; we have read too of the murder of a Socrates, under the delusion of a republic. An independent and firm judiciary protected and protecting by the laws, would have snatched the one from the fury of a despot, and preserved the other from the madness of a people.

I have considered these observations on the necessary independence of the judiciary, applicable and important to the case before this honorable court, to repel this wild idea, that a judge may be impeached and removed from office, although he has violated no law of the country, but merely on vague and changing opinions of right and wrong; propriety and impropriety of demeanor. For if this is to be the tenure on which a judge holds his office and character; if by such a standard his judicial conduct is to be adjudged criminal or innocent, there is an end to the independence of our judiciary. In opposition to this reasoning, I have heard (not from the honorable managers) a sort of jargon about the sovereignty of the people; and that nothing in a republic should be independent of them. No phrase in our language is more abused or misunderstood; the just and legitimate sovereignty of a people is truly an awful object, full of power and commanding respect. It consists in a full acknowledgment, that all power originally emanates, in some way from them, and that all responsibility is finally, in some way, due to them; and whether this is acknowledged or not, they have, if driven to the last resort, a physical force, to

make it so; but, sir, this sovereignty does not consist in a right to control or interfere with the regular and legal operations and functions of the different branches of government at the will and pleasure of the people. Having delegated their power; having distributed it for various purposes into various channels and directed its course by certain limits they have no right to impede it while it flows in its intended directions, otherwise we have no government; in like manner, the officers of government are responsible in certain modes and at certain periods for the exercise of their duties and power; but the people have no right to make them accountable in any other manner, or at any other period than that prescribed by the great compact of government; or constitution. Having parted with their power under certain regulations and restrictions they are done with it; they are bound by their own act and having retained and declared the manner in which they will correct abuses in office, they have no right to claim any other sort of responsibility; if this be not the case, what government have we? What rule of conduct? What system of association? none. Both are truly in a state of savage anarchy and restless confusion; with all the vices incident to civilization without the restraints to control them.

Having discussed this necessity preliminary point as to what is or is not impeachable, I will proceed to a consideration of the charge now in issue between the respondent and house of representatives of the United States.

It is true, that Judge Chase did form and reduce to writing, and, in a limited manner, deliver an opinion on a question of law, on the construction of which the defense of the accused materially depended; but when the article goes on to charge that this opinion tended to prejudice the minds of the jury against the case of John Fries, the prisoner, before counsel has been heard in his defense, it is utterly unfounded and untrue. To whom was this opinion delivered? To the counsel for Fries and the attorney for the United States; and to no other person. The third copy, and but three were made, never was delivered to the jury or to any other person and never could produce any prejudice or injury to John

Fries; nor indeed was it ever intended to come to the knowledge of the jury until they had completely heard the decision of the case by counsel, when they were to have taken out with them this opinion of the judge, upon the law of the case submitted to them. At that period of the trial, when it was not only the right but the duty of the court, to state to the jury their opinion of the law arising on the facts, then and not until then, was it the intention of the judge to communicate to them this deliberate opinion. Could this be done, with any intention to injure or oppress the prisoner? If such was the intention of the act, then, and not otherwise, it was criminal.

In all criminal prosecutions for an act, equivocal in itself, and whose character of guilt or innocence depends upon the intention with which it was done; the declarations of the party made at the time, are always received in evidence, to ascertain and fix the true character of the act, and the fair and legal explanation of the act is taken and derived from such declarations of the party, if not disproved by other evidence. What then did Judge Chase himself say of his intention and motives in relation to this opinion?

Mr. Lewis states that on this occasion Judge Chase said that he had understood that at the former trial there had been a great waste of time on topics which had nothing to do with the business or case, and in reading common law decisions on the doctrine of treason, as well as under the statute of Edward III. before the revolution; and also relating to certain acts of Congress for crimes less than treason. That to prevent this in future, he or they had considered the law, made up their minds and reduced it to writing; and in order that the counsel might govern themselves accordingly, had ordered three copies to be made out, etc. Here then the judge, at the time of the act, now charged to proceed from a corrupt and partial intention, declares in unequivocal language, what were his true motives. His object was to prevent an unnecessary waste of time in a court, where a vast deal of criminal and civil business was then depending and waiting for trial. This was the motive and the only motive,

declared and avowed by the judge, at the time he delivered this offensive paper, and, unless it be disproved by the evidence or the circumstances of the case, it must be taken to be the true one. It is not a subject of inquiry now, whether the reason he assigned for this proceeding be a good or bad one; it is enough to our purpose that it most certainly is neither partial nor corrupt. As the motive was not partial, so neither was or could be the act oppressive to the prisoner, unless the judge in executing his design of preventing the waste of time, pursued it to an unreasonable extent. If he obstructed only the introduction of irrelevant matter, and did not exclude anything which could and ought to have benefitted the prisoner, he was guilty of no injustice or impropriety. If the proper and legal rights of the counsel or of the prisoner were curtailed to his injury, there was certainly injustice done; but if nothing more than wholesome and reasonable restrictions were imposed, to the manifest advantage of the general business of the court and of other suitors there, without any unjust detriment to John Fries, then not only the motive was correct, but the act was highly laudable, and such was undoubtedly the case.

It is well known in Pennsylvania that the loudest clamors are made against our courts for the delays of justice, and the unreasonable time spent in the trial of every cause. These complaints had doubtless reached the ears of the judge; there was an enormous list of important civil causes then before him, and he presumed that any expedient fairly to save time would be acceptable to everybody; to counsel as well as to suitors.

How then did the judge carry this intention into execution. The opinion of the court on the points likely to arise in the case, was put in writing and delivered to the counsel. Was this any disadvantage to them? Was it not rather a friendly guide to them, by which they might shape their argument so as best to meet the points of difficulty, and serve their client. The court furnish each side, the United States as well as the prisoner, with copies of this opinion. This would have the effect to regulate and confine the arguments

on both sides to the proper channel, to the real points of difficulty, and prevent a wild, devious and useless extension of the argument into matters wholly irrelevant. It was surely an advantage to Fries' counsel thus to know the opinion of the court on the points of law in their case, and thus to have an opportunity of meeting and repelling it. If they could convince the court or jury this opinion was erroneous, they would succeed for their client. But if the court had permitted the counsel to take the usual course, and had kept their own opinion in close reserve without any intimation of its direction, until the argument was closed, and had then delivered it to the jury as unquestionably they might have done, and this opinion had contained some points which had been overlooked by the counsel, surely it would have been more prejudicial to the prisoner than the course that was pursued. The jury would naturally take the law from the court, and if therefore the judge intended to have oppressed John Fries, he would have succeeded better by reserving his opinion, concealing it from the counsel, permitting them to flounder on in the dark, and then, in his charge to the jury, dictate the law to suit his partial and oppressive purpose. Would any gentleman of the law, about to argue a case before a court, think himself aggrieved if the judge were previously to inform him of the ideas he entertained of the case, with full liberty to controvert them? It would be esteemed a favor.

The second specification of the first article consists of two parts; it complains of a restriction as to English authorities, and as to American statutes. I cannot conjecture how it can be resolved into partiality or oppression. It will be seen presently that as far as this restriction could have any operation it was friendly in that operation to John Fries. But, sir, what was this restriction so much complained of and now magnified into a high crime? That certain English decisions on the law of treason made before the revolution of 1688 should not or ought not to be read to the jury. And pray sir, what were these decisions? I will take their character from Mr. Lewis himself, and no man is better acquainted with them. He says they were the decisions of corrupt and de-



pendent judges, who carried the doctrines of constructive treasons to the most dangerous and extravagant lengths. True they were so; sanguinary, cruel and tyrannical in the extreme. And could the exclusion of such cases injure John Fries? If cases which extenuated and softened the crime of treason had been rejected, he might indeed have suffered; but how he was or could be injured by keeping from the jury those cases which aggravated his offense, I am really at a loss to learn. The restriction then was on the United States. Had they been adduced by the district attorney, no doubt they would have been ably answered by the defendant's counsel; but the ability of the counsel for the United States was not inferior to Fries' counsel; and if Judge Chase had indeed a design to oppress and injure John Fries, and to convict him on strained constructions of treason, his best policy would surely have been to have suffered these cases to come forward, and if supported by his authority and the talents of the counsel of the United States they might have had their influence with the jury, notwithstanding the able refutations they might have received. But why and for what good purpose did the counsel desire to read these cases, operating, if they operated at all, directly against the life of their client. Why would they fatigue the court and impose upon the jury with those wicked and ridiculous decisions against a man who wished his stag's horns in the king's belly—and another, who declared he would make his son heir to the crown. Sir, there could have been but one object in this attempt. It was this, to excite such horror in the minds of the jurors by reciting these tales of tyranny and blood, as would create a general prejudice in them against the law of treason. The abhorrence which would be honestly given to such extraordinary cases of cruelty practiced under the law of treason, they hoped would extend itself to all cases of treason, even the most just and upright. Now, as to the statutes of the United States: That any such restriction was laid upon the counsel of John Fries, rests wholly and entirely on the testimony and recollection of Mr. Lewis. I will, sir, first consider the nature and extent of this charge against the respondent, supposing the

facts to be—I presume it will be granted to me that a judge has some sort of authority in a court; that he does not set there as a mere cipher, without power or command. Among the acknowledged powers of a judge, is that of regulating and directing in some degree the argument before him, and of preventing the introduction of matter either grossly improper or palpably irrelevant to the issue. If then it be demonstrated that these statutes of the United States had really and truly nothing under heaven to do with the trial of John Fries, I hope the judge will not be condemned for excluding them. John Fries, sir, was indicted for the treason of levying war against the United States; and for no other offense. This crime is created and defined by the constitution of the United States. It became the duty of the attorney of the United States, to show to that court and jury that the prisoner had been guilty of the treason charged in the indictment according to its definition and description in the constitution, or the prosecution must fail. If, on the other hand, he did show this to the satisfaction of the court and jury, John Fries must necessarily be convicted. Now, sir; what possible influence or control could any act of Congress have over the character of a crime defined in and derived from the higher authority of the constitution. The act of Congress could not enlarge, restrict or in any way alter or affect the constitutional description. To what proper purpose then could any act of Congress be read? Why, sir, we have heard something about a legislative construction of the constitution; and that these acts of Congress defining sedition and other offenses, might be used and were important to show what was intended by the constitution in the description of treason. In the first place, sir, Congress in passing these statutes never had the most remote idea or intention of giving any sort of construction or opinion upon the law of treason; and if they had such an intention, it was beyond their powers and rights and should be wholly disregarded, not only by that court but by this. The construction of the constitution, in common with every other law, belongs exclusively to the judiciary, as best qualified both from its permanency and independence as well as from

legal learning, to exercise so important a right. The necessity of a power existing somewhere to judge of the constitution and of the conformity or non-conformity of laws to the provisions of it, results from the very nature of a written constitution; it is vain we have an instrument paramount to ordinary legislation if there is no authority to check encroachments upon it, and there is no department of government with whom this power can be so safely lodged, or by whom it can be so ably and impartially exercised as the judiciary. If the legislature, the very branch of government most controlled by the constitution, and intended to be so, shall be permitted to assume the wide and unlimited right of construction, the constitution will sink at once into a dead and worthless letter, moulded into various fantastic shapes at the wish of the legislature, and purporting one thing today and another tomorrow and nothing at last; but Congress, I repeat, sir, in passing the sedition law, had no intention whatever of giving their construction to the constitutional description of treason, or of affecting or touching it in any way. The counsel of Fries were therefore about to use or abuse the act of the legislature to purposes never contemplated or intended! Should the court suffer a delusion of this sort to be practiced upon a jury, equally disrespectful to the court and to the Congress. It was not Judge Chase only who thought these statutes of the United States totally irrelevant to the case of Fries. They had been solemnly adjudged to be so, after every exertion of the talents of the counsel to show their application and force. I refer you, sir, to the opinion of Judge Iredell on the first trial of Fries. (See *ante*, p. 1.)

Will it be pretended, sir, that counsel have a right to read anything before the court which they may find in a law book; is there anything of such peculiar dignity and privilege in the statutes of the United States, that any of them may at all times and on all occasions, whether pertinent or not, be read in a court of justice; and it is a high crime in a judge to prevent it. Suppose the counsel had chosen on the trial of Fries to amuse themselves with reading the revenue laws of the United States; would the mere circumstance of their be-

ing bound in our statute book have given them such a sacred character that the court would be bound to listen with the most respectful attention to such an absurd waste of time. I do not hesitate to aver that the revenue laws have full as clear and proper an application to the case of John Fries as either of the statutes the counsel were so anxious to produce.

I will proceed to consider as briefly as possible, the third and last specification. In this the judge is charged with "debarring the prisoner from his constitutional privileges of addressing the jury (through his counsel) on the law as well as on the fact." This charge is absolutely unfounded and untrue. Judge Chase when he threw down the paper containing the opinion of the court had formed on the law, explicitly declared, that nevertheless, counsel would be heard against that opinion. Mr. Lewis seems throughout the business to have been under an impression that nothing would be heard in contradiction to that opinion, and that his professional rights were invaded; but this appears to be a hasty and incorrect inference or conclusion of his own, from the conduct of the court; he wholly misapprehended the court, and has charged his misapprehension to their account. This is the usual effect of such precipitate proceedings. The managers have greatly relied on this circumstance; they urge that Mr. Lewis, through the whole of the affair and in all he said concerning it, took for granted and stated, that he was debarred from his constitutional privileges. He did so; but he did so under a mistake of his own, not proceeding from the court.

Attention to what passed on the second day, as it is called, of Fries, will most abundantly prove that the judge never had intended any partiality or oppression against him; and certainly, that if he had any such intention, he never carried it into execution or effect; and I trust I am safe in saying, that the mere intention to commit a crime, however gross and outrageous, unless carried into some sort of action or effect, constitutes no offense. A man may intend to commit a larceny assault and battery, or any other offense, but while he ab-

stains from the act, the mere intention cannot subject him to trial or punishment.

Granting the judge had been in error on the first day, what could he or any man do more than to rectify the error as soon as discovered, and hasten to the right path before any injury could have resulted from his momentary deviation. But the honorable manager has told you he had sinned beyond the grace of repentance, and that no contrition, however sincere, could wipe away the offense. The corrupt intent charged upon him, is disproved by his entire willingness to permit the counsel to manage their cause in their own way if they disapproved of his, and by his full and candid retraction of the error, if any error had been committed.

The papers were accordingly resumed, every copy collected and the counsel, the prisoner and the jury were placed in the same precise situation as if these papers had never been distributed; with the most ample acknowledgment of all their rights, and the most urgent solicitations to them to proceed in the enjoyment and exercise of them. But no; the counsel had taken their ground, and nothing could move them. John Fries had received their instructions and with equal perseverance declined the aid of other counsel offered to him by the court repeatedly. Now sir, let me ask you and this honorable court, on your consciences, not to be blinded by the management and finesse of ingenious counsel—what was the meaning of all this? What was the object of it? Did the counsel now believe they would not be fully heard in defense of their client, both on law and fact? Did they now suppose themselves or the jury restricted in their rights, or that a just and impartial trial would not be had? No such thing; most certainly not. But, in the language of Mr. Lewis, they thought they had got the court in an error, or a scrape, and they were determined to keep them there. What, says Judge Peters, if we have done wrong, will you not suffer us to repair that wrong by doing what is right, by doing all that you have required? No; no; was the answer. Mr. Lewis has declared to you, sir, in the most ample and explicit terms, that they abandoned John Fries, because they

thought they took a better chance of saving him by this means, than they could have by any trial; and to use his own words in another part of his testimony, "we withdrew," says he, "from the defense of John Fries, because we thought it would best serve him, and we were not influenced by any other motive whatever." They had already, before Judge Iredell, tried the efficacy of the full and unconfined exertion of their talents in his defense, and found how vain the attempt was. They were well satisfied no hope of success could be entertained on a fair trial of the merits of their case both in law and fact, and they eagerly grasped any occurrence, that by operating upon the passions, the humanity, or the prejudices of mankind, might give their client a chance for escape, which he could not look for in the merit of his own conduct. With this view they most solemnly impressed upon the mind of Fries the necessity of his maintaining the ground they had taken for him, and refusing the assistance of any other counsel. So well did these gentlemen know the court had no intention of oppressing John Fries, that in their communications to him, they anticipated the offer of other counsel to supply their desertion.

A very strange and unexpected effort has been made, sir, to raise a prejudice against the respondent on this occasion, by exciting, or rather forcing, a sympathy for John Fries. We have heard him most pathetically described as the ignorant, the friendless, the innocent John Fries. The ignorant John Fries. Is this the man who undertook to decide that a law, which had passed the wisdom of the Congress of the United States, was impolitic and unconstitutional; and who stood so confident of this opinion, as to maintain it at the point of the bayonet? He will not thank the gentleman for this compliment, or accept the plea of ignorance as an apology for his crimes. The friendless John Fries. Is this the man who was able to draw round himself a band of bold and determined adherents, resolved to defend him and his wild doctrines, at the risk of their own lives and of the lives of all who should dare to oppose. Is this the John Fries who had power and friends enough, actually to suspend, for a con-

siderable time, the authority of the United States over a large district of country; to prevent the execution of the laws, and to command and compel the officers appointed to execute the law, to abandon the duties of their appointment, and lay the authority of the government at the feet of this friendless usurper. The innocent John Fries. Is this the man against whom a most respectable grand jury of Pennsylvania in 1799, found a bill of indictment for high treason, and who was afterwards convicted by another jury equally impartial and respectable, with the approbation and under the direction of a judge, whose humanity and conduct on that very occasion, has received the most unqualified praise of the honorable manager who thus sympathizes with Fries. Is this the John Fries against whom a second grand jury, in 1800, found another bill for the same offense, founded on the same facts, and who was again convicted by a just and conscientious petit jury. Is this innocent German the man, who, in pursuance of a wicked opposition to the power and laws of the United States, and a mad confidence in his ability to maintain that opposition, rescued the prisoners duly arrested by the officers of the government, and placed those very officers under duress; who, with arms in his hands and menace on his tongue, arrayed himself in military order and strength, put to hazard the safety and peace of the country, and threatened us with all the desolation, bloodshed and horror of civil war; who at the moment of his desperate attack, cried out to his infatuated followers, "come on, I shall probably fall on the first fire, then strike, stab and kill all you can." In the fervid imagination of the honorable manager, the widow and orphans of this man, even before he is dead, are made, in hypothesis, to cry, at the judgment seat of God against the respondent; and his blood, though not a drop of it has been spilled, is seen to stain the pure ermine of justice. I confess, sir, as a Pennsylvanian, whose native state has been disgraced with two rebellions in the short period of four years, my ear was strangely struck, to hear the leaders of one of them addressed with such friendly tenderness and honored with such flattering sympathy by the honorable manager.

It is unusual, sir, in public prosecutions, for the accused to appeal to his general life and conduct in refutation of the charges. How proudly may the respondent make this appeal. He is charged with a violent attempt to violate the laws and constitution of his country, and destroy the best liberties of his fellow citizens. Look, sir, to his past life, to the constant course of his opinions and conduct and the improbability of its charge is manifest. Look to the days of doubt and danger; look to that glorious struggle so long and so doubtfully maintained for that independence we now enjoy, for those rights of self-government you now exercise, and do you not see the respondent among the boldest of the bold, never sinking in hope or in exertion, aiding by his talents and encouraging by his spirit; in short, putting his property and his life in issue on the contest, and making the loss of both certain by the active part he assumed, should his country fail of success. And does this man, who thus gave all his possessions, all his energies, all his hopes to his country and to the liberties of this American people, now employ the small and feeble remnant of his days, without interest or object, to pull down and destroy that very fabric of freedom, that very government and those very rights he so labored to establish. It is not credible; it cannot be credited, but on proof infinitely stronger than anything has been offered to this honorable court on this occasion. Indiscretions may have been hunted out by the perseverance of persecution; but I trust most confidently, that the just, impartial and dignified sentence of this honorable court will completely establish to our country and to the world, that the respondent has fully and honorably justified himself against the charges now exhibited against him, and has discharged his official duties, not only with the talents which are conceded to him, but with an integrity which is infinitely more dear to him.

#### MR. KEY FOR THE DEFENSE.

*February 22.*

*Mr. Key* spoke on the second, third and fourth articles. The juror, Basset, was competent to serve. To be indifferent, as applied to a juror, means that he shall not be actuated by malice or



favor towards either party. Grant that Basset had made up his mind on the sedition law, and that such a work as the *Prospect Before Us*, came within it. Who was there of any understanding or political information in Virginia, that had not made up his mind on the constitutionality or unconstitutionality of the sedition law? What man but concurred in opinion that the *Prospect Before Us*, was a wicked, disgraceful and malignant libel? And where can you find it a disqualification of a juror, or a cause of challenge to a juror, that he has declared an opinion as to the law? Has not every man from his infancy heard and often declared that one man to kill another with malice prepense was murder; yet this is an opinion formed and declared as to the law arising on a particular state of facts. Suppose a man indicted for murder and an exception was taken to a juror that he had formed and delivered an opinion on the law, because he had said the killing of a man with malice prepense was murder, would not such an exception be scouted out of courts? Is not such a man notwithstanding such opinion, competent and impartial as to hearing and weighing the evidence in the case before him? As to the intent with which the act was done, charged to be murder? And in what does the present case differ? Basset thought the extracts he had seen in the newspapers came within the sedition law. He thought that law constitutional; but whether Callender was the author, whether the publication was malicious and false, and edited with intent to defame, were facts to be determined from the evidence in the cause, were facts as to which he had formed no opinion, and relative to which he had neither heard or uttered a word, and consequently was competent to an impartial decision.

But even if Judge Chase was wrong in his decision, it must be proved that he acted corruptly to procure a conviction. It has been argued that every man is liable to punishment who acts contrary to law, and that the judge having given an opinion and acted contrary to law is liable to be punished. Miserable would be the condition of a judge, if every error of judgment was construed into corruption—called into office to determine complicated cases arising from the conflicting interests of individuals, to punish the crimes and the villainies of mankind, more cannot be required of him than that he should carry to the judgment seat, talents and integrity; a clear head and a pure heart. Judges must be made of men, and from the imperfection of human nature, must be incident to its frailties—in what code are they to be deemed infallible? By what means are they to become so? And if so, then why the unnecessary establishment of appellate courts, to rectify errors of inferior jurisdictions in all well organized governments? Why not punish all inferior judges on reversal of their judgment by a superior tribunal, if error be admitted as proof of corruption?

The rejection of John Taylor's testimony was legal and proper, and if the judge erred, there is no ground to suspect corrupt intentions. To prove that President Adams was an aristocrat, was no justification of the libellous matter contained in the 12th set of

words; the term in itself conveys no imputation, is not libellous; it becomes so by its connection with the subsequent words, forming an entire sentence, which words were not attempted to be justified. That part of the publication that states Mr. Adams to be an aristocrat was inducement only to the subsequent libellous matter contained in the same sentence; and to admit a man to prove inducement, to prove what is immaterial, to prove a part only, and then set it up as a justification of the real libellous words, and of the whole charge, would disgrace judicial proceedings.

The first specification of the fourth article, that of compelling the prisoner's counsel to reduce to writing and submit to the inspection of the court for rejection or admission, all questions meant to be propounded to Colonel Taylor, what injustice could result to Callender from this procedure. It is contended that this was arbitrary and oppressive, new and usual in Virginia. It was novel in Virginia, but it does not therefore follow that it was impeachable and criminal. Different practices prevail in different states, but the practice is to be tested by its reason and propriety.

The second specification is refusing the continuance. An application for the continuance of a cause on affidavit, is always to the discretion of the court; exercised for the furtherance of justice under the circumstances disclosed. The great object of criminal jurisprudence is, that trials for offenses shall speedily take place, and punishment be lenient but certain. In Maryland, where the respondent had long presided in a criminal court, offenses are always tried the same term at which the indictment is found as a matter of course. The affidavit stated the witnesses to be at the remote ends of the continent; it did not state a belief that they could be obtained in any reasonable and definite time; in truth it was a shallow pretext for delay; the witnesses were not wanted.

To the third specification. "In the use of unusual, rude and contemptuous expressions towards the prisoner's counsel." Witnesses say he called them young gentlemen, a term certainly not rude or contemptuous, and most probably arising, as he was a stranger, from not immediately recollecting their names, and was full as decorous, as calling them by name. Judge Marshall saw nothing particular and offensive in the court. Mr. Randolph saw nothing in the court evidencing a disposition to oppress Callender. Col. Taylor observed that the conduct of the judge was imperious, sarcastic and witty, and another witness observed that he was extremely facetious, but none of them have said he was rude, contemptuous or oppressive.

The third and fourth specifications seem designed to designate the lines of civility between the bench and bar, and to establish certain rules for decorous behavior in their intercourse; and were we trying the judge for violating such rules, our time might not be misapplied. Polished manners, suavity of disposition and decorous behavior, give grace and elegance to men in all offices and situations; but on the bench we should be satisfied with fond knowledge, inflexible integrity and firmness of opinion. When or where was the

want of decorous behavior to counsel deemed an impeachable offense.

The fifth specification is a charge of indecent solicitude manifested by the judge. Solicitude is an operation of the mind—it means mental anxiety. A judge cannot be deemed guilty of a crime for feeling a solicitude that guilt should be punished or innocence acquitted. It is said that before the trial the judge manifested a determination to convict Callender; and in support of this, his jocular conversations have been brought forward as proof of his intent. The mass of testimony relied on to prove Judge Chase's indecent solicitude to convict Callender, terminates, on examination, in a jocular conversation in a public room; an unimportant remark in a public stage; and the discrediting a witness who to speak of him most respectfully was grossly mistaken.

#### MR. LEE FOR THE DEFENSE.

Mr. Lee devoted his speech to the fifth and sixth articles. The whole charge in the fifth article is, that by authority of the judge, a *capias* was awarded against Callender, when that process ought to have been a summons. It is not alleged that the *capias* was awarded with any corrupt or evil intention of any kind. If then the article contains no charge of a crime, there must be an acquittal. A *capias* in the case of Callender was the proper process, according to common law principles, and the English authorities of modern date. In reason and common sense, a *capias* is the proper process where the offense is punishable by imprisonment. Callender was charged with an offense punishable by fine and imprisonment. In such a case, a summons would be a notification to the offender to abscond or remove himself out of the reach of the court.

Any doubt as to the propriety of issuing the *capias*, is entirely removed by the laws of the United States. The 14th section of the "act to establish the judicial courts of the United States," gives power to the circuit courts, to issue all writs necessary for the exercise of their jurisdiction, and agreeable to the principles and usage of law, and the 11th section of the same act, gives exclusive cognizance of all crimes and offenses cognizable under the authority of the United States to the circuit courts, except otherwise directed by that or some other statute. The court which awards the writ is to decide what process is necessary for the exercise of its jurisdiction, and agreeable to the principles and usage of law in each particular case. Section 33 of the same statute authorizes a judge of the circuit court to order a process for the arrest of the accused for any crime or offense against the United States, agreeably to the usual mode of process of arrest against offenders in the state where the court is holden, and the offense committed. A summons is not authorized by the section because a summons is not a process of arrest. We call upon the learned managers to point out any other process by which a person can be arrested, even in Virginia, except by a *capias*. In England, in Virginia, in Maryland, in every state, the process of arrest is by *capias*.

The 7th section of the act of Congress of March 2, 1793, enacts "that it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering up judgment by default, and other matters in the vacation, and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings." I know not what language can convey a more complete power to the court over its process. A uniform rule in the courts of the United States is very desirable, that offenders and criminals may be brought to trial by the like forms in every state for violations of the statutes of Congress. To allow one kind of process in Virginia, and a different one in Maryland for the same offense, would be an heterogenous and unequal mode of administering justice. Judge Chase then rightly determined that the laws of the State of Virginia, which require a summons to be issued in cases of the commonwealth, did not apply to the court of the United States.

The charge in the sixth article is that he, with intent to oppress and procure the conviction of Callender, ruled him to trial during the term at which he was presented and indicted, contrary to the laws of Virginia, which it is alleged have provided that in cases not capital, the offender shall not be held to answer any presentment of a Grand Jury until the next succeeding court.

This article may be understood as affirming, that there exists some law of Virginia which positively prohibits the trial of a misdemeanor at the same term at which the indictment is found. No such law has been produced, and we deny that any such law of Virginia exists.

But it has been said that in England it is not usual or according to the general course of proceedings, to try petty misdemeanors at the same court that the traverser pleads. For this is cited, 4 Black. 351, and it is also said that the practice of Virginia conforms to the practice in England in this instance. Let this be admitted, and what does it avail. The practice that has been mentioned applies only to petty misdemeanors, and the law has always distinguished between petty misdemeanors and those of a greater malignity. The practice does not apply to what are termed *crimina majera*. Can it be said that such a rule of practice applies to the case of Callender. Was he indicted for a petty misdemeanor? no, he was not.

The Judge acted not only according to law, but with humanity in bringing the traverser to trial at the same term at which he was indicted. If the trial had been postponed to another term, and Callender in the mean time had been imprisoned, such a conduct in the court would have given cause of complaint against the Judge, who would then have been accused of postponing the trial of an innocent man, for the purpose of oppression. What in such a case

ought the Judge to have done? Exactly what he did. Obeying the constitution and the laws of the United States, he brought the traverser to a speedy and public trial.

*February 23.*

*Mr. Rodney.* Mr. President, with the permission of the learned counsel for the respondent, I wish to produce an authority or two, which I conceive material in this case, and wish to afford them an opportunity of attempting to controvert them. One of the counsel (Mr. Lee) has referred to the rules of the Supreme Court, where it is said that "that court would consider the practice of the king's bench, as forming the outline for them." And he has deduced this inferences that the circuit courts would follow the example of the Supreme Court, and be governed by the practice of the king's bench also. In order to show the practice in England, I will refer to Bacon Abridgment, 6 Vol., p. 656, where it is declared that the courts will postpone a trial for two terms, on account of the absence of witnesses, provided there is no cause of suspicion that a delay was only intended. From this case I shall insist, that Judge Chase was bound to continue the trial of Callender. There is a case in Cowper's Reports, where the person accused made an affidavit of the absence of a very material witness, who was out of the reach of the process of the court. And the court informed the prosecutor, that unless he would consent that the deposition of the witness should be taken and read in evidence, that they would postpone the case forever. In England, courts of common law have no power to issue commissions to take the depositions of witnesses, unless by consent, and therefore Lord Mansfield declared, that although the court could not oblige the prosecutor to consent, yet they would postpone the trial forever unless he did. But the statutes of the United States expressly authorize the courts to issue commissions, and therefore there is force in the observation of Judge Chase, that Callender's witnesses lived in so dispersed a situation that it was impossible to procure their attendance. In answer to the observations made by the counsel for the respondent, that a judge is not impeachable unless indictable, I will refer to a passage in the constitution of Pennsylvania: where, although nearly the express words on the subject of impeachment are used as in the constitution of the United States, yet it also provides for the removal of any judge, upon the address of two-thirds of the legislature. And there has been a recent case where a judge was removed, for indecent and ungentlemanly conduct towards his brother judge. I allude to the case of Judge Addison. Mr. Addison made the same point which has been made in this trial, that a judge could not be removed unless for a violation of law, and that he had violated none. But he was ably anticipated by Mr. Dallas, and was as ably replied to by the Attorney General of Pennsylvania (Mr. M'Kean) on this subject, and the Senate did actually remove him. The constitution of the United States declares, "That the judges both of the Supreme and inferior courts, shall hold their offices during

good behavior." And I mean to contend that misdemeanor and misbehavior are convertible terms, and that a judge is liable to impeachment for a misbehavior in office. And surely sir, if a judge misbehaves himself in office and is removed for it, he has no person to blame but himself.

MR. MARTIN FOR THE DEFENSE.

*Mr. Martin:* Mr. President. Did I only appear in defense of a friend, with whom I have been in habits of intimacy for nearly thirty years, I should feel less anxiety on the present occasion, though that circumstance would be a sufficient inducement; but I am, at this time, actuated by superior motives. I consider this cause not only of importance to the respondent and his accusers, but to my fellow citizens in general (whose eyes are now fixed upon us), and to their posterity, for the decision at this time will establish a most important precedent as to future cases of impeachment.

In the discussion of this cause, I fear I shall occupy a greater portion of your time than I could wish, but, as the charges are brought forward by such high authority as the house of representatives of the United States, it becomes necessary to bestow upon them more attention than they would deserve, were they from a less respectable source.

We have been told by an honorable Manager (Mr. Campbell) that the power of trying impeachments was lodged in the senate with the most perfect propriety; for two reasons,—the one, that the person impeached would be tried before those who had given their approbation to his appointment to office. This certainly was not the reason by which the framers of the constitution were influenced, when they gave this power to the senate. Who are the officers liable to impeachment? The president, the vice-president, and all civil officers of government. In the election of the two first the senate have no control, either as to nomination or approbation. As to other civil officers who hold their appointments during good behavior, it is extremely probable that, though they were approved by one senate, yet from lapse of time and the fluctuations of that body, an officer may be impeached before a senate, not one of whom had sanctioned his appointment, not

one of whom perhaps, had he been nominated after their election, would have given him their sanction.

This, then, could not have been one of the reasons for thus placing the power over these officers. But as a second reason, he assigned that if any other inferior tribunal had been entrusted with the trial of impeachments, the members might have an interest in the conviction of an officer, thereby to have him removed, in order to obtain his place; but, that no senator could have such inducement. I, sir, disclaim, I hold in contempt the idea that the members of any tribunal would be influenced in their decision by so unworthy, so base a motive; but what is there to prevent this senate, more than any other court, from being thus influenced? Is there any thing to prevent any member of this senate, or any of their friends, from being appointed to the office of any person removed by their conviction?

I speak not from any apprehension I have of this honorable court. In their integrity I have the greatest confidence. I have the greatest confidence they will discharge their duty to my honorable client with uprightness and impartiality. I have only made these observations to show that the reasons assigned by the honorable Manager for vesting the trials of impeachment in the senate, are fallacious.

I see two honorable members of this court who were with me in the convention, in 1787, who as well as myself, perfectly know why this power was vested in the senate. It was because, among all our speculative systems, it was thought this power could no where be more properly placed, or where it would be less likely to be abused. A sentiment, sir, in which I perfectly concurred, and I have no doubt but the event of this trial will show that we could not have better disposed of that power.

Let us now, sir, examine the constitution on the subject of impeachments and from thence learn in what cases and in what only impeachments will lie. To have correct sentiments on this subject is of infinite importance. An error here would be like what is called an error in the first concoction, and would pervade the whole system.

By the constitution it is declared that "The House of Representatives shall have the sole power of impeachment." That section, however, doth not declare in what cases the power shall be exercised. This is designated in a subsequent part of the Constitution, and I shall contend that the power of impeachment is confined to the persons mentioned in the constitution, namely, "the President, the Vice-President, and all other civil officers."

Will it be pretended, for I have heard such a suggestion, that the house of representatives have a right to impeach every citizen indiscriminately? For what shall they impeach them? For any criminal act? Is the house of representatives, then, to constitute itself into a grand jury to receive information of a criminal nature against all our citizens, and thereby to deprive them of a trial by jury? This was never intended by the constitution.

The president, vice-president, and other civil officers can only be impeached. They only in that case are deprived of a trial by jury;—they, when they accept their offices, accept them on those terms, and as far as relates to the tenure of their offices, relinquish that privilege; they, therefore, cannot complain. Here, it appears to me, the framers of the constitution have so expressed themselves as to leave not a single doubt on this subject.

In the first article, section the third, of the constitution, it is declared that judgment in all cases of impeachment shall not extend further than removal from office and disqualification to hold any office of honor, trust or profit under the United States. This clearly evinces that no person but those who hold offices are liable to impeachment. They are to lose their offices, and having misbehaved themselves in such manner as to lose their offices, are with propriety, to be rendered ineligible thereafter.

The next question of importance is, in what cases the house of representatives have a right to impeach the president, the vice-president, and the other civil officers.

It has been said that a judge cannot be indicted for the same crime for which he may be impeached: for, says the



honorable Manager (Mr. Campbell), it would introduce the absurdity that a person might be twice punished for the same crime.

This honorable court will observe that the two punishments which may here be inflicted on impeachment and subsequent indictment, amount to no more than in England takes place on a single prosecution; for there, on a single conviction, a judge may be removed from office and also fined, imprisoned, or otherwise punished, according to the nature of his offense. But the whole of this power the United States have not vested in the same body. To the senate they have confined the punishment of removal from office, and disqualification of the person from holding offices in future; but can there be a single doubt that a person, by impeachment, removed from office, cannot afterwards, according to the nature of his crime, be punished by indictment? Can gentlemen suppose a removal from office was intended to wash away all crimes the officer should have committed? what are the crimes for which an officer can be impeached? "Treason, bribery, and other high crimes and misdemeanors."

Suppose a judge removed from office by impeachment for treason, would that wash away his guilt? would he not afterwards be liable to be indicted, tried and punished as a traitor? undoubtedly he would, so in the case of bribery. Yet, if the gentleman's idea is correct, a removal from office on impeachment, for either of those crimes would free the officer from any other punishment. Consider the monstrous consequences which would result from the principle suggested by the Managers, that a judge is only removable from office on account of crimes committed by him as a judge and not for those for which he would be punishable as a private individual! A judge, then, might break open his neighbor's house and steal his goods; he might be a common receiver of stolen goods; for these crimes he might be indicted, convicted and punished in a court of law, but yet he could not be removed from office, because the offense was not committed by him in his judicial capacity, and because he could not be punished twice for the same offense.

The truth is the framers of the constitution, for many reasons which influenced them, did not think proper to place the officers of government in the power of the two branches of the legislature, further than the tenure of their office. Nor did they choose to permit the tenure of their offices to depend upon the passions or prejudices of jurors. The very clause in the constitution, of itself, shows that it was intended, the persons impeached and removed from office, might still be indicted and punished for the same offense, else the provision would have been not only nugatory, but a reflection on the enlightened body who framed the constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for one offense, could prevent the same person from being indicted and punished for another and different offense.

I shall now proceed in the inquiry, for what can the president, vice-president, or other civil officers, and consequently, for what can a judge, be impeached? and I shall contend that it must be for an indictable offense. The words of the constitution are, that "they shall be liable to impeachment for treason, bribery, or other high crimes and misdemeanors."

There can be no doubt but that treason and bribery are indictable offenses. We have only to enquire then, what is meant by "high crimes and misdemeanors." What is the true meaning of the word "crime?" It is the breach of some law which renders the person who violates it, liable to punishment. There can be no crime committed where no such law is violated.\*

Crimes and misdemeanors are the violation of a law, exposing the person to punishment; and are used in contradistinction to those breaches of law which are mere private injuries and only entitle the injured to a civil remedy.

Hale, in his pleas of the Crown, volume first, in his *Præmium*, which is not paged, speaking of the division of crimes, says:

"Temporal crimes, which are offenses against the Laws of this

\* Mr. Martin quoted Jacob's Law Dictionary as to the definition of "Crime" and "Misdemeanor."

Realm, whether the common law or acts of Parliament, are divided into two general ranks or distributions in respect to the punishments that are by law appointed for them, or in respect of their nature or degree; and thus they may be divided into capital offenses, or offenses only criminal, or rather, and more properly into felonies and misdemeanors. And the same distribution is to be made touching misdemeanors, namely they are, such as are so by the common law, or such as are specially made punishable, as misdemeanors by acts of Parliament."

Thus then it appears that crimes and misdemeanors are generally used as synonymous expressions, except that "crimes" is a word frequently used for higher offenses. But while I contend that a judge cannot be impeached except for a crime or misdemeanor, I also contend that there are many crimes and misdemeanors for which a judge ought not to be impeached, unless immediately relating to his judicial conduct. Let us suppose a judge provoked by insolence, should strike a person. This certainly would be an indictable, but not an impeachable offense. The offense for which a judge is liable to impeachment must not only be a crime or misdemeanor but a high crime or misdemeanor. The word "crime" as distinguished from misdemeanor is applied to offenses of a more aggravated nature, the word "high," therefore, must certainly equally apply to misdemeanors as to crimes. Nay, sir, I am ready to go further and say there may be instances of very high crimes and misdemeanors for which an officer ought not to be impeached and removed from office; the crimes ought to be such as relate to his office, or which tend to cover the person who committed them, with turpitude and infamy; such as show there can be no dependence on that integrity and honor which will secure the performance of his official duties.

But we have been told and the authority of the State of Pennsylvania has been cited by one honorable Manager (Mr. Rodney) in support of the position that a judge may be impeached, convicted and removed from office for that which is not indictable; for that which is not a violation of any law.

What, sir, can a judge be impeached and deprived of office when he has done nothing which the laws of his country pro-

hibited? Is not deprivation of office a punishment? Can there be punishment inflicted where there is no crime? Suppose the house of representatives to impeach for conduct not criminal, the senate to convict, doth that change the law? No, the law can only be changed by a bill brought forward by one house in a certain manner, assented to by the other, and approved by the president. Impeachment and conviction cannot change the law, and make that punishable which was not before criminal.

It is true it often happens that the good of the community requires that laws should be passed making criminal and exposing to punishment conduct which antecedently was not punishable; but even in those cases, government has no power to punish acts antecedently done; it can only punish those acts done after the enactment of the law. The constitution has declared "*no ex post facto law shall be passed.*"

Should such a principle be once admitted or adopted, could the officers of government ever know how to proceed? Admit that the house of representatives have a right to impeach for acts which are not contrary to law and that thereon the senate may convict, and the officer be removed, you leave your judges, and all your other officers at the mercy of the prevailing party. You will place them much in the unhappy situation as were the people of England during the contests between the white and red roses, while the doctrine of constructive treasons prevailed. They must be the tools or the victims of the victorious party.

I speak not, sir, with a view to censure the principles or the conduct of any party which hath prevailed in the United States since our revolution, but I wish to bring home to your feelings what may happen at a future time. In republican governments there ever have been—there ever will be, a conflict of parties. Must an officer, for instance a judge, ever be in favor of the ruling party, whether wrong or right? or, looking forward to the triumph of the minority, must he, however improper their views, act with them? Neither the one conduct or the other is to be supposed but from a total dereliction of principle. Shall then a judge by honestly per-

forming his duty and very possibly thereby offending both parties, be made the victim of the one or the other or perhaps of each, as they have power? No, sir, I conceive that a judge should always consider himself safe while he violates no law, while he conscientiously discharges his duty, whomever he may displease thereby.

But an honorable Manager (Mr. Campbell) hath read to us an authority to prove that a judge cannot in England be proceeded against by indictment for violation of his official duties but only in parliament, or by impeachment; his authority was the new edition of Jacob's law dictionary. Let me be indulged with reading to this honorable court the case from 12 Coke, the case of Floyd and Barker to which Jacob refers, and it will be found that the reasons there assigned however correct they might be as to judges in England, can have no possible application to the judges of the United States.

"It was resolved that the said Barker who was judge of assise, and gave judgment on the verdict upon the said W. P. and the sheriff who did execute him according to the said judgment, nor the justices of peace who did examine the offender, and the witnesses for proof of the murder before the judgment, were not to be drawn in question, in the Star-chamber, for any conspiracy; nor any witness, nor any other person ought to be charged with any conspiracy in the Star-chamber, or elsewhere, when the party indicted is convicted, or attaint of murder or felony and although the offender upon the indictment was acquitted, yet the judge, be judge or assise, or a justice of peace, or any other judge by commission and of record, and sworn to do justice, cannot be charged for conspiracy for that which he did openly in court as judge or justice of peace: and the law will not admit any proof against this vehement and violent presumption of law, that a justice sworn to do justice, will do injustice, but if he hath conspired before, out of court, this is extra-judicial, but due examination of causes out of the court, and inquiring by testimony, and similar, is not any conspiracy, for this he ought to do; but subornation of witnesses, and false and malicious prosecutors, out of court, to such whom he knows will be indictors, to find any guilty, etc., amounts to an unlawful conspiracy.

"And as a judge shall not be drawn in question in the cases aforesaid, at the suit of the parties, no more shall he be charged in the said cases before any other judge at the suit of the King.

"And the reason and cause why judge, for any thing done by him as judge, by the authority which the king (concerning his jus-

tice) shall not be drawn in question before any other judge, for any surmise of corruption, except before the king himself, is for this; the king himself is *de jure* to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the King's oath.

"And forasmuch, as this concerns the honor and conscience of the king, there is great reason that the king himself shall take account of it, and no other."

But even in England it has been solemnly determined that judges may be proceeded against by indictment for the violation of the laws in their official conduct, for which I refer this honorable court to Viner's abridgment, 14th vol., page 579 (F) pl. 3 and in notes, where he says:

"A justice cannot rase a record, nor imbesil it, nor file an indictment which is not found, nor give judgment of death where the law does not give it, but if he doth this it is misprison and he shall lose his office, and shall make fine for misprison."

And to Hawkins Pleas of the Crown, vol. 1st, ch. 69, F. 6, where that author tells us:

"It is said, that at common law, bribery in a judge, in relation to a cause depending before him, was looked upon as an offense of so heinous a nature, that it was sometimes punished as high treason, before the 25th Ed. 3d, and at this day it certainly is a very high offense, and punishable, not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment, etc."

Mr. President, the principle I have endeavored to establish is that no judge or other officer can, under the constitution of the United States, be removed from office but by impeachment and for the violation of some law, which violation must be, not simply a crime or misdeameanor, but a high crime or misdemeanor.

But an honorable Manager (Mr. Rodney) who has this morning referred to some authorities, as to other parts of the case, has also contested the correctness of the foregoing principle, and has introduced the constitution of the state of Pennsylvania, by which he hath told us a judge may by the governor be removed from office without the commission of any offense, upon the vote of two-thirds of the two houses for his removal; notwithstanding that constitution hath a simi-

lar provision for removal by impeachment as hath the constitution of the United States. To this I answer, as we have no such provision in the constitution of the United States, the reverse is to be inferred, to wit, that the people of the United States, from whom the constitution emanated, did not intend their judges should be removed, however obnoxious they might be to any part, or to the whole, of the legislature, unless they were guilty of some high crime or misdemeanor, and then only by impeachment. It is also well known that the governor of Pennsylvania hath not considered those words in the constitution of that state "that he may remove the judges on such address," as being imperative. For in a recent instance, where he did receive such address, instead of admitting the construction to be, as was contended, "you must" he determined it to be "I will not," and I have had the pleasure of seeing that judge, sometimes since that transaction, on the bench with his brethren dispensing justice. I again repeat that as the framers of the constitution of the United States did not insert in their constitution such clause as is inserted in the constitution of Pennsylvania, it is the strongest proof that they did not mean a judge or other officer should be displaced by an address of any portion of the legislature, but only according to the constitutional provisions.

The same gentleman (Mr. Rodney) has told us that the tenure by which a judge holds his office is good behavior, therefore that he is removable for misbehavior; and further, that misbehavior and misdemeanor are synonymous and coextensive. Here I perfectly agree with the honorable gentleman, and join issue with him. Misbehavior and misdemeanor are words equally extensive and correlative; to misbehave or to misdemeanor is precisely the same; and, as I have shown that to misdemeanor, or, in other words to be guilty of a misdemeanor, is a violation of some law punishable, so of course, misbehavior must be the violation of a similar law.

The same honorable gentleman has mentioned the impeachment and conviction of Judge Addison, and hath told us that he was not impeached for the breach of any law, but only for rude or unpolite conduct to his brother judge;—that this ob-

jection was made with much energy on his defense, but that the senate were convinced by the great talents and eloquence of Mr. Dallas and some other gentleman, that the objection was groundless, they therefore convicted and removed him. I have not here the proceedings against Judge Addison, and therefore it is possible the senate of Pennsylvania erected themselves into a court of honor to punish what they might consider breaches of politeness; but doth this honorable court sit here to take its precedents from the state of Pennsylvania or any other state, however respectable? I should rather hope that this honorable court should furnish precedents which might be respected and adopted by the different states. I would also ask, when was that precedent established? was it not at a time when there is too much reason to believe that the warmth and violence of party had more influence in it than justice; and, that the senate of Pennsylvania overleaped their constitutional limits? but if we are to go to Pennsylvania for a precedent, why should we not be guided by that, which the same state has so recently given us in a trial in which that gentleman bore so conspicuous a part? a precedent of acquittal; a precedent which we are perfectly willing should be adopted, and which we trust will be adopted on the present occasion.

My observations thus far have been principally with a view to establish the true construction of our constitution, as relates to the doctrine of impeachment. I, now, Mr. President, will proceed to the particular case before this honorable court, and in the first place I agree with the honorable Managers, that there is a manifest difference even between the credibility of witnesses, and the credibility of testimony, for I admit, if witnesses are equally credible and some swear that words were uttered, or acts were done; and others that they did not hear the words, or that they did not see the acts done, the presumption is certainly in favor of the positive, and against the negative testimony. But this must be admitted with considerable restrictions.

If, immediately after a transaction there is a full and clear memory of the words spoken or the acts done, there is great



reason to credit the testimony, but even in that case, if there are a number of persons equally respectable, having an equal opportunity to hear and see, and who were attentive to what took place, and none of them heard or saw, what is testified by a single witness, there would be great reason to suspect the affirmative witnesses to be mistaken; more so if the transactions had happened for some years antecedent to the examination.

But, as to Heath, we do not contradict him merely by negative testimony; we contradict him by a series of positive facts proved by characters whose veracity cannot be doubted, which positive facts incontestibly show that what he swore never could have taken place. And, here again, permit me, sir, to make a further observation; that, where a person is charged criminally for words he is supposed to have uttered, those words ought to be proved with precision. Every witness on this occasion who have been examined as to expressions used by my honorable client, either on the one or other charge, which are held as exceptionable, declares he cannot pretend to recollect the express words uttered by the judge, but only to state what at this distance of time he can consider the amount of what was said. Nay, Messrs. Lewis and Dallas declare further that they cannot pretend to say with accuracy what part of the conversation, of which they give testimony, took place on the first or the second day, or in what order. Such kind of testimony, therefore, ought to be received with great caution and not to be considered as conclusive.<sup>b</sup>

This principle equally applies, where a person is charged criminally on account of words spoken, whether the offense is supposed to be treason or only misdemeanor.

I will now, Mr. President, proceed to consider the conduct of my honorable client on the trial of Fries, and to examine the law upon that case, and of course to investigate the rights of judges in criminal cases, as well as the rights of attorneys. I do not mean to go minutely into the testimony

<sup>b</sup> Citing McNally on Evidence, p. 518.

which has been given in that case: but, taking it up on that given by Messrs. Lewis and Dallas, to examine whether the court is to control the counsel or to be mere ciphers, destitute of authority to restrain and keep within bounds the lawyers when acting improperly. The whole of the practice, of which I have heard during this trial as being usual in the courts of Pennsylvania and Virginia, hath been to me, at least, as novel as the conduct of Judge Chase appears to have been to the honorable managers. I, sir, have always considered it the province of the court in the course of a trial, in all cases, whether civil or criminal, to declare what is the law. This right is admitted in civil cases but it seems is denied in criminal. And therefore it is contended that in criminal cases counsel have a right to address the jury upon the law, and to urge them to determine the law in contradiction to the decision of the court. How doth the jury acquire the power of deciding the law in any case? Because, upon the general issue, having a right to give a general verdict, which involves both law and fact, the jury incidentally have the power to decide the law. But this doth not authorize them to give a verdict contrary to law. When a case comes before a jury, the court informs them what is the law if they believe the facts given in evidence; if they do believe the facts, they are bound in duty to decide according to the law thus explained to them by the court. The decision ought to be the same as if the facts had been found by the jury in a special verdict, and the law left to the court. The jury, I admit, have the power to decide the law contrary to the direction of the court, but I deny that they have a right to do it. No person will deny that it is much more proper for the court to decide the law than that it should depend upon jurors, who in general are ignorant of the law. In civil cases a jury sometimes give a verdict contrary to the direction of the court, but the court correct this abuse of power by interposing and granting a new trial, thereby correcting the evils which would result from such abuse.

Let us then examine this question as to criminal cases. Is it not as important to society that there should be uniform

and fixed principles for the decision in criminal as in civil cases? Would it not be highly improper that one man should be convicted for a crime and another who had committed the same, be acquitted merely from the passions, prejudices or ignorance of jurors, influenced thereby to decide the law differently in the different cases, though perfectly similar in criminality? no person can doubt on this subject.

Where then is the difference between civil and criminal cases? It is not that the jury have a greater right to decide the law in the last than in the first; but that having the power to give a general verdict, which incidentally involves the law, they may give a verdict contrary to law, and contrary to the direction of the court; and the courts of justice, not having in criminal cases, through tenderness, enforced the remedy of a new trial, the abuse of power, thus practiced in some cases by juries, have been uncorrected. No person can doubt but that juries in criminal as well as in civil cases ought to give their verdict according to law, and when ever they do not, they are answerable to their consciences and to their God, however they may be exempt from human punishment.

The right of the court to decide the law is the same in criminal as in civil cases. If there is a demurrer to an indictment, the court decides without the intervention of a jury. If there is a demurrer to evidence, the court decides the law—so if a special verdict is found which may be found in a criminal as well as in a civil suit.

The power of the jury, as I have before said, to decide against law, doth not give them the right, any more than the power of a person to knock down a man weaker than himself gives him the right so to do. And if juries in any case knowingly give a verdict contrary to the law instead of acting impartially, which is the duty of a jury, they act with criminal partiality.

So great is the difference of sentiment between the honorable managers and some of the witnesses who have been examined in this trial and myself upon the rights of juries to decide the law in criminal cases, that in confirmation of my own sentiments and to convince this honorable court I do not

wish to impose upon them ; I hope I shall be indulged in reading to them a very respectable authority upon this subject.<sup>c</sup>

In this prayer I most cordially join, and with the learned commentator, hope that this wise distribution of power may long continue to flourish unimpaired either by the proud encroachments of ill-designing judges or the wild presumption of licentious jurors. Such as I have here stated, I consider the principles of the English law, and to these principles I cheerfully subscribe.

But the principles adopted on this impeachment, and advocated, as I understand, by the honorable managers, appear to me to have a direct tendency to break down every barrier between the province of the court and the jury, giving every thing to the latter and nothing to the former, and so far from placing them or the counsel under the direction and control of the court, prohibit the court from restraining either the jury or the counsel, under the danger of impeachment. I differ with them. If in any case the law is known to be settled by a uniformity of decisions, a court of justice degrades itself if it permits counsel to take up their time in arguing against it. If the question is not considered as fully settled, counsel certainly ought to be heard, but it is to the court they ought to address themselves. In England the first lawyers who have ever existed, have not thought themselves degraded by arguing the law in criminal as well as in civil cases, before the court. If counsel should attempt to impose on the jury what is not law, is the court to sit tamely by and suffer them to proceed? Such has not been the practice in the courts which I have attended. Where the law is known to be settled, or where, upon application to the court, a determination is given, the counsel must go before the jury upon the fact, and endeavor to distinguish his case, and show that it doth not come within the law as established ; or should counsel attempt to state any thing to the jury which appears designed to controvert the law as declared, they are immediately stopped by the court, and to persist would be consid-

<sup>c</sup> Reading from Coke, Lit. 155.

ered highly indecorous, nor would the court permit it to be done. In Maryland the lawyers do not claim as a constitutional right to mislead and deceive the judges, much less to mislead and deceive the jurors, free from any control of the court.

But it has been said that juries are most proper to decide the law in criminal cases, thereby to prevent a criminal from being borne down and oppressed by the weight of the prosecuting power. What case can arise in the country, to which this argument can apply? In England before the revolution, while judges were dependent on the crown, if also wicked and corrupt, there might, where government was interested, be some such cases. But is our situation to be compared to that of England at that time? If so, it was not worth while for us to have taken upon ourselves the risks of the late revolution to have changed our government.

Is there any thing to induce judges to oppress any individual even though offensive to government, while they are independent? Any danger of that kind is to be apprehended from judges who are dependent.

And hence flowed the great constitutional provision which secures the independence of the judges, which secures them from being removed or punished while they discharge their duty.

What probability is there that a judge would do injustice to any person with a view to please any party, when he could have but very little prospect of reward and would be sure that though he did his duty he could not be removed from office or exposed to injury?

I wish this honorable court to reflect on the nature of man. In a government like ours there will always be majorities and minorities. Minorities will often be powerful and frequently in due time become majorities: If a judge should do an act pleasing to the majority he must know it may render him hateful to the minority, who in course of events may get the power in their hands. If he endeavors to ingratiate himself with the minority he exposes himself to the displeasure of the ruling majority. It is the duty of a judge to enforce the

laws while they exist, however unpopular those laws may be to any portion of the community. If he enforces such laws he will gain the approbation of one party but he will as certainly be disapproved by the other. Would you then wish that your judges should be exposed to be removed from office because, by the most honest conduct, they had displeased one party or the other, and leave them at the mercy of those who should from time to time hold the power of government in their own hands? No, it is the sacred independence of the judiciary, and that alone, which can be the best security that the judges shall not act with oppression.

But let me ask further, are juries more free from undue influence than judges? Have they greater inducements to do what is right? They do not possess the elevated situation of the judges, they feel not the same responsibility; whatever may be the impropriety of their conduct, it would probably be scarcely heard of out of their own neighborhood, not long even there. They are liable to all the political prejudices of men devoted to the different parties which may exist. They are generally men totally ignorant of the law, nay, I shall prove when I come to speak of Basset's case, that though the managers contend the jury should decide the law, yet ignorance of the law is by them considered the first recommendation of, nay, a necessary requisition for a juror!

Can it then be wise to reduce a judge to the humiliating situation of having the law decided by such a body, exposed to be led into error by the ingenuity of counsel? Can it be the wish to trust their property, their lives, all that is most dear to them, even as to legal questions, to the wild ideas of jurors liable to all the frailties of human nature, in preference to the sound discretion of judges well skilled in the law and holding a high and responsible station?

Having laid down these general principles as to the relative rights and duties of the court, the bar and the jury, I shall proceed with my honorable client to the state of Pennsylvania.

It was known that John Fries, charged with treason, had on a former trial been found guilty and that a new trial

had been granted upon a suggestion, which I hope will not become a precedent—will never be a rule for decisions. When I say this I mean not to detract from the merit of that highly respectable character who presided and who granted the new trial. His conduct flowed, I am convinced, from his humanity; his was the error of the heart, not of the head. It was an honest nay, an amiable error. My honorable client knew when he arrived at Philadelphia that the trial of Fries was to take place that term. He has been acknowledged by the honorable managers, to be a gentleman of the highest legal talents. In this they have only done him justice; and have been as prodigal of their praise as his warmest friends could have wished. It would have given me great pleasure if they had been as just in expressing their sense of his integrity. He had been in the practice of the law for forty years, and also a judge for a number of years, and for about six years I believe presided in the criminal court of Baltimore County, where, during that time, there were more criminal trials probably than in any other court in America. I believe I speak moderately when I say that I have attended on behalf of the state, at least five thousand criminal trials in that court. From those circumstances it is to be presumed that he was not deficient in knowledge of what related to criminal proceedings, but would he have acted the part of an upright judge, if he had not endeavored to make himself master of the law of treason, when a case of that nature was about to come before him; particularly the law of treason as it related to levying war against the United States, or in adhering to those who levied war against them, which is the only kind of treason that our constitution acknowledges; although I have heard I must own, of treason against principles of the constitution, and treason against the sovereignty of the people, words well enough suited to a popular harangue, or a newspaper essay, but not for a court of justice.

When Judge Chase arrived at Philadelphia he had the advantage of perusing the notes of Judge Peters and the

district attorney, relating to the former trial; he thereby became well acquainted with all the points at that time made by the counsel for Fries; and Mr. Lewis has sworn, that all the points which were intended to have been made before Judge Chase had been made at the former trial. Why then should the court either wish, or be obliged to hear counsel again on the law? In two previous cases the law had been settled. Judge Paterson, a gentleman of the first abilities, mild and amiable, whom no person will charge with being of a vindictive oppressive disposition and who certainly has more suavity of manners than my honorable client, had, after a most patient and full hearing where eminent counsel attended, decided the law as was decided by the respondent. Judge Iredell, whose encomium has been most justly given us by the managers, a gentleman of great legal talents, than whom no worthier man has left this for a better world and who, while living, honored me with his friendship, after having heard Messrs. Lewis and Dallas, and after full and patient investigation, gave in the case of Fries himself a similar decision; in both which opinions Judge Peters perfectly coincided. Under these circumstances Judge Chase, who had no doubt of the propriety of those decisions, to prevent waste of time when there was so much business to transact, and to facilitate the business, thought it best to inform the counsel on each side, that the court considered the law to be settled and in what manner. For which purpose they delivered to the clerk three copies of their opinion, one for the counsel on each side, the third to be given to the jury when they left the bar. On this subject Mr. Lewis in his testimony said it was to be given to the jury when the counsel for the United States had opened, or after he had closed the pleadings, but he believed the last. Mr. Rawle is clear that it was to be given to them when the case was finished to take out with them.

No gentlemen on behalf of the impeachment has denied the correctness of this opinion. But the criminality of the



judge, is, we are told, not in the opinion itself, but in the manner and the time in which it was given.

Was there any thing improper that the opinion should be reduced to writing? Why are opinions given? surely to regulate the conduct of those to whom given; for this purpose they ought to be perfectly understood and in no degree subject to impeachment; delivering the opinion in writing, greatly facilitates these objects, if therefore it was proper to give an opinion, it was meritorious to reduce it to writing, and, Judge Chase in so doing most certainly acted with the strictest propriety. And, unless a court of justice is bound to sit and hear counsel on points of law where they themselves have doubts before they give their opinion, my honorable client could not be incorrect in delivering it at the time when it was delivered. If the opinion was proper, how, I pray, could any injury be done to Fries by its being delivered? The honorable managers say it was intended to influence the jury. In the first place this assertion is not supported by the evidence. When the paper was thrown on the clerk's table, not one word was said of its contents; nor did the court declare any opinion on Fries case. They only determined the indictment correct in point of form and not liable to be quashed. They determined that the overt acts stated were overt acts of treason, if Fries had committed them, but whether Fries had committed those acts remained for the jury to determine upon the evidence; as to that part of the case the court gave no opinion. But the honorable managers have told us that Judge Chase must have known what were the facts in the case, because they had been disclosed in the former trial. And I pray you, sir, if he had that knowledge could it alter the law in the case or render the declaration of what the law was more improper? But, as a new trial was granted, the judge could not know what additional evidence might be brought forward to vary the case from its former appearance.

Nor did, sir, the judge's conduct either improperly influence nor was it intended so to influence the jury. No

copy of the opinion would have been taken but for the conduct of Mr. Lewis, and no testimony has been offered to show the least probability that one single jurymen ever saw the copy or knew one word of its contents. Nay, sir, it is proved that Judge Chase took uncommon pains to prevent any of the jurors from being prejudiced against Fries; for, although a great number of criminals indicted for sedition, submitted to the court before Fries was put upon his trial, the judge would not permit one single witness, who was summoned against Fries, to be examined on the submissions, least the jury, by an examination which would have been as to Fries, *ex parte*, might take up prejudices against him. This, Mr. President, was an act of the judge that carries with it the most convincing proof that he had no wish to oppress Fries or to prevent him from having an impartial trial, and I pray that this circumstance may be deeply impressed on the mind of every member of this honorable court.

But if the opinion had been publicly read and known, how could it have injured Fries? he was to have an impartial trial. What is the meaning of these expressions? It is a trial according to law and fact in which, if he is proved innocent, he shall be acquitted; if guilty, convicted. If then the opinion was agreeable to law it could not prevent, it could not interfere with his having an impartial trial. If in any case a person is acquitted, when the facts are clearly proved and the law is against him, it must be because he has had a partial, not an impartial trial.

I again ask, sir, ought the court, who were perfectly satisfied with respect to the law and who considered it settled by previous decisions, in which they perfectly concurred, to have wasted perhaps several days of the public time before they gave their opinion, in listening to Messrs. Lewis and Dallas exerting all the powers of eloquence and sophistry, to mislead their judgment? Nor did even Judge Chase give his opinion, without the full consideration of the arguments of each of these gentlemen in the very case of Fries. On his arrival it is admitted by the managers

that he became perfectly acquainted with the proceedings in the former trial as to the legal questions which had occurred from the notes of Judge Peters and of the district attorney; and this honorable court have had an opportunity of witnessing with what precision that gentleman takes down the substance of proceedings on a trial. Judge Chase had an opportunity of examining and considering the arguments used by Messrs. Lewis and Dallas at the former trial on the different legal questions then brought forward; the authorities produced and the applicability of those authorities. He there saw everything that the great legal knowledge and high talents of those gentlemen indulged to the utmost extent and heard with the greatest patience had produced in favor of Fries. And he had the opportunity of calmly and deliberately considering the whole of these arguments and authorities in his chamber. And having done this, where would be the propriety of spending day after day in listening to the same arguments orally repeated in court, which he had read in his closet, the merit of which he had there coolly discussed and deliberately decided?

But the managers say that this ought to have been done. That though the court had no doubt of the law, and although it is not contended but that the opinion given is correct, yet it was the duty of the court to have patiently listened to the counsel, and suffered them to exert all their eloquence, their ingenuity and sophistry to pervert their judgment and lead them into error, to prevail over their understanding and obtain from them an erroneous opinion. And yet in the same breath we are told by one of the honorable managers (Mr. Campbell) that if a judge gives an erroneous opinion, the presumption is that he doth it from corrupt and criminal motives and that on impeachment it is necessary that he should prove the uprightness and integrity of his intentions.

Thus, then, they insist that if a judge, intelligent, sensible, well acquainted with the law doth not indulge counsel in their attempt to lead him into error, he is to be impeached for it. And if the judge should listen to counsel

against his well formed opinion and by their ingenuity be led to give up his better judgment and pronounce an erroneous opinion, he is to be impeached for that also!

Nay, it is expressly said that the more completely the law is considered to be settled, the more absolutely necessary it is that the criminal's counsel should be permitted to argue the law to the court and to contend against the law so settled. Thus, then, I suppose if a person is tried for an assault and battery, the prisoner's counsel must be indulged by the court, and that under pain of impeachment, in spending as much time as they please, in endeavoring to convince the court that to come up behind an innocent inoffensive man and fracture his skull with a bludgeon, doth not amount to an assault and battery; or if a person is tried for a burglary his counsel must also, under the same penalty, be indulged in the endeavor to convince the court that to break into a dwelling-house in the night time and steal therefrom is not the offense of burglary.

But the honorable managers do not stop even here. They say that even had Judge Chase indulged the counsel of Fries with all the length of time they might think proper in an endeavor to pervert the judgment of the court, and their endeavor had proved unsuccessful, the court was further under pain of impeachment, after they had correctly declared the law to the jury, to suffer the counsel to take up as much more time as they pleased in endeavoring to mislead the jury by impudently and insolently in the face of the court, attempting to impress them with the idea that the court, though acting under a solemn oath and having no interest to mislead them, had given an erroneous opinion; and to induce them to receive the law from the counsel themselves, acting not under similar obligations, but whose fame and whose fortunes might be materially benefited by deceiving the jury—from counsel whose every interest might be to pervert justice.

All which indulgence the court, it seems, is equally bound to give to the counsel in endeavoring to mislead the jury and pervert justice in the cases I have before mentioned of

assault and battery or burglary or, in reality, of any other offense, however incontestible the principles of law in such cases may be. Such are the constitutional rights which criminals and their counsel we are told possess; the constitutional right if possible to impose upon the court; and if they fail there the constitutional right to impose upon the jury; in other words, the constitutional right to pervert justice!

Nay, we are told the more manifest the guilt, the more necessary that he should enjoy these constitutional rights; and so it would be if the constitution intended, as seems to be the idea of the managers, that guilt should go unpunished; since such offenders can have no chance to escape, unless justice be perverted through the ingenuity of counsel operating upon the ignorance, the passions or the prejudices of judges or jurors.

The managers have, consistent with the above idea which they seem to have adopted, exclaimed "what good could counsel do to Fries after the court had decided the law? as to the facts there were no dispute. Under such circumstances to assign counsel to him was mockery, was insult."

In reply, I will admit, that Fries case was such that counsel could not render him much service, but this was not the fault of the court, it was the fault of the case itself, it was because the law was clearly against him and because the evidence indisputably proved that he had committed acts which brought him within the law.

In such cases what is the duty of the counsel, whether assigned by the court or employed by the prisoner? It is to advise the prisoner to plead guilty and throw himself upon the mercy of his country, instead of taking up the time of the court and creating expense by a jury trial; but such advice, however agreeable to the constitution of our country, would not, I admit, agree very well with the constitution of a lawyer, as thereby he might occasionally lose large fees extorted from a criminal, fed on the vain hope that the eloquence and chicanery of his lawyer might procure his acquittal, contrary to law and contrary to evidence!

But counsel may be of service to a criminal however guilty he may be and has duties which he may correctly perform; the counsel may with propriety avail themselves of any defect in the indictment or other proceedings; they may take care that the panel of jurors are legally and impartially returned; they may direct the prisoner as to his challenges to jurors; they may take care that no incompetent witnesses are sworn, and that no improper testimony is given; they may in any questions of law, not considered settled, be heard and have the questions decided; in fine, they may take care that the prisoner has a fair trial; but when all this has been done, if agreeably to law and clear undoubted evidence, the prisoner is guilty it is the duty of the counsel to submit his client's case to the honest decision of the jury, without any attempt to mislead them; and this, whether the counsel are appointed by the court or employed by the criminal. Thus lawyers in Maryland are in the habit of conducting themselves in such cases and thus ought lawyers, who respect themselves and have a regard for their own characters, to conduct themselves in all places.

I have heard so much, Mr. President, in this case about the constitutional rights of criminals to have counsel; and that the counsel should argue to the jury upon the true construction of the law against the direction of the court; and that the jury have the right to decide the law without regard to such direction; and finding also, that this article of impeachment, as well as the arguments in support of it, appear to be grounded on these principles, that I have been almost induced to suppose I had misread the eighth amended article of the constitution, but on turning to it I find that the constitution secures to the criminal the assistance of counsel, to see that his trial is fairly and correctly conducted, but has not given to the person charged with an offense, or to his counsel, if he is guilty, any constitutional rights for the purpose of his evading punishment by the imposition of counsel, either on the court or the jury.

Whatever may have been the practice I have ever considered it contrary to the duty of counsel, either in civil or

criminal cases, to exert their abilities in attempting to procure a decision which they are conscious is unjust. The duty of a lawyer is most certainly in every case to exert himself in procuring justice to be done to his client, but not to support him in injustice.

Having made these observations on the relative duties of the court and counsel, let me advert a moment to the conduct of Mr. Lewis, as appears from his own testimony. When my honorable client delivered at the clerk's table the copy of the opinion designed for the defendant's counsel, having taken it in his hand—without opening it—without reading one word—Mr. Lewis contemptuously threw it from him, publicly declaring that “he would never contaminate his hand by receiving into it a prejudicated opinion in any cause where he was concerned from any judge whatever.” What insolence! Would to God, no lawyer may ever contaminate his hand in a more disgraceful manner than by receiving therein a sensible, correct, legal opinion in a cause about to be tried at whatever time it may be delivered to him!

He also informs us, that he declared to the court, that he never had nor ever would so far degrade himself as a lawyer, as to argue a question of law in a criminal case, before the court. What arrogance! Sir, the most eminent, the most respectable lawyers both in England and America have been in the constant habit, not only of arguing questions of law in criminal cases before the court, but in modestly submitting to their decisions without ever considering it as lessening their consequence. I have long been at a loss, sir, for the enmity the state of Pennsylvania has shown for its bar and the desire of its citizens to get rid of their lawyers; but if such is the manner in which the lawyers conduct themselves to their courts—if they, when they are employed in a cause, claim the constitutional right, uncontrolled by the court, instead of furthering justice, to pervert it; I wonder no longer why the citizens of that state wish to be freed from them. And will readily join in the sentiment, “the sooner the better.” I will go further

and say, if their courts submit to such conduct and think themselves bound to be the passive witnesses of such perversion of justice, it is not much matter how soon they also get rid of their courts for they might as well be without them.

The principles, which have been advocated in support of this article, are subversive of the whole order of things; instead of lawyers being the officers of the court, subject to their control and amenable for the propriety of their conduct, the judges must be the menial, degraded instruments of the lawyers, and must suit their conduct, not to propriety and justice, but to the pleasure of any haughty overbearing lawyer, possessing abilities and popularity and that too under the hazard of being impeached and turned out of office, if his principles should, on any occasion, render him restive, or, in the language of the testimony, if he should "take the stud."

And here, Mr. President, I hope I shall be indulged with some inquiry as to this "prejudicated opinion," which Mr. Lewis seems to think has such a contaminating, polluting tendency to the hand of a lawyer, and of which he was so apprehensive, that he would not retain it for a moment. I confess I feel myself here at a loss to know exactly what the witness meant by a "prejudicated opinion" on the law. I should suppose that the expression, if it can in any instance be correctly applied, must mean the same as to prejudge the law; which, if used to signify any thing improper, must be confined to the case where a person forms an erroneous opinion of the law without using all due means to acquire correct information.

To prejudge any case I consider as meaning that a person without competent knowledge of facts, hath formed an opinion injurious to the merits of the case. If the term prejudication is used in this sense there is no pretense that my honorable client gave a prejudicated opinion in the case of Fries; for it is not alleged that the opinion given was not strictly legal and correct. Neither Mr. Lewis nor Mr. Dallas have ever attempted to hazard their characters



by suggesting the contrary nor have the honorable managers taken that ground; they do not contest its propriety. Should they in their reply I shall cheerfully rest that question upon the well known legal abilities of Judges Iredell, Paterson, my honorable client, the associate judges, who concurred with them and the legal knowledge of this honorable court.

But if by a prejudicated opinion is meant that the judge from his great legal knowledge and familiar acquaintance with the law as relative to the doctrine of treason, particularly levying war against the United States, had formed a clear decided opinion that the facts stated in the indictment against Fries, if proved as laid amounted to treason, I will readily allow that I have no doubt my honorable client had thus prejudicated the law, not only before Fries was brought to trial, but before he had committed the treason for which he was tried. But if this manner of prejudicating law is thought improper, nay, criminal, in a judge, a prejudication, which is nothing more than an eminent and correct knowledge of the law, why I pray are gentlemen of great talents and high legal attainments sought for in your appointments of judges? how, sir, are they to free themselves from this obnoxious prejudication of the law and acquire the contended fitness for the trial of a cause, but by forgetting all that legal knowledge which had been a principal inducement to their appointment? If I understand the gentlemen, to gratify their ideas, we ought to have judges, who, when they take their seats on the bench to preside at the trial of a criminal, should not have one single legal idea relative to the offense about to be tried, but should have their minds exactly in that state in which some ingenious metaphysicians tell us the human soul is when first united to the body, like a pure unsullied sheet of white paper ready to receive any impressions which may be made upon it.

Well be it so and let us consider the trial of Fries as if it had been conducted on that principle. The judges with their minds like this white sheet of paper were to sit still

and suffer the counsel to scrawl thereon whatever characters they pleased, to blot and to blurr it until they were perfectly satisfied. After this ceremony the judges, examining the impressions thus made upon the antecedent clear sheet, were from these and these only to form their opinion of the law. And this opinion having been thus formed from nothing but what occurred during the trial and after the jury were sworn, would not be called a prejudicated opinion, and therefore I presume would be perfectly satisfactory to the honorable managers. So far we should have done very well as it related to the trial of Fries. But next day another criminal is to be tried for a similar offense; Messrs. Lewis and Dallas are not his defenders. Getman has selected Mr. Tilghman for his counsel. How, I pray you, are the judges to be qualified to preside with propriety in this trial? yesterday they gave a solemn determination in Fries case upon the same question of law which now must come forward in the case of Getman. Mr. Tilghman was not then heard. The opinion, then given, as to Mr. Tilghman and his client is as much a prejudicated opinion, an opinion as contaminating to the hand of a lawyer to receive and as highly criminal for a court to give as was the opinion given by my honorable client. What can be done? the minds of the judges are no longer a pure unsullied sheet of paper. Yesterday, in the trial of Fries, they had been scrawled upon and sullied by Lewis and Dallas; the impressions still remain. I, sir, can think of no remedy in this difficulty except that the judges should be supplied with a reasonable quantity of India rubber or something which shall answer in its place, with which they might wipe off and erase every impression which had been made the day before by Lewis and Dallas, during the trial of Fries. And thus once more take their seats on the bench, for the trial of Getman, with minds again like clean sheets of white paper ready to be scrawled over, again to be blotted and blurred at the pleasure of Mr. Tilghman and from these scrawls, blots and blurrs, and from these alone, to take their impressions as to the law and form their decision as

to Getman's case without regarding or even remembering the decision they had given the day before. And in this manner to proceed in every case that might come before them successively in their judicial capacity!

If, sir, judges are to be censured for possessing legal talents, for being correctly acquainted with the law in criminal cases and for not suffering themselves to be insulted and the public time wasted by being obliged to hear arguments of counsel upon questions which have been repeatedly decided and on which they have no doubt; I pray you let not our courts of justice be disgraced, nor gentlemen of legal talents and abilities be degraded by placing them on the bench under such humiliating circumstances! but let us go to the corn-fields, to the tobacco plantations and there take our judges from the plow and the hoe. We shall there find men enough possessed of what seems to be thought, the first requisite of a judge, a total ignorance of the law! That degradation which no gentlemen of merit and abilities could endure, they will not feel.

In reply to an observation made by my very respectable colleague who opened our defense and which I have endeavored to enforce, "that if the opinion given by the court was correct, Fries could receive no injury thereby, though Messrs. Lewis and Dallas had not been suffered to argue against that opinion, because the opinion ought, notwithstanding, to have been the same." One of the honorable managers hath said that had Judge Chase sentenced Fries to death without the verdict of a jury; had he decided the fact as well as the law; and he says he might have done the one with as much propriety as the other, it might have been urged in the same manner in defense of the judge, "that it was of no consequence to Fries, for the fact being clearly against him, had he been tried by a jury, the jury must have found him guilty, and then the judge must have done what he did, sentence him to death."

This argument is totally fallacious. By the constitution and the laws of the United States the criminal has a right to demand that the facts shall be decided by a jury. This the

court cannot refuse if the criminal requires it. Was a judge to refuse the criminal the trial of the fact by a jury he would violate a well known legal and constitutional right of the criminal. But as the criminal has a right that the jury should determine questions of fact, so do the principles of jurisprudence equally declare it to be the right of the court to decide questions of law, and the constitution in no part contravenes this right; it no where says that the judges must be ignorant of the law, and take their impressions from the counsel of the criminal, or that it is the right of counsel to be heard where the court has no doubt of the law, or to argue to the jury that the law is contrary to the direction of the court, or that the jury should have a right to decide the law contrary to such direction. Hence, therefore, there is this great distinction between the two cases; in the first the court only exercise their own rights, infringing no right of the criminal; while in the last the court would act in direct violation of his well known legal and constitutional rights. But though the criminal has the constitutional right to have all facts decided by a jury, he may wave this right, in which case the court may pass sentence without the intervention of a jury, as where the criminal demurs to the indictment and rests upon his demurrer, or where he pleads guilty, in which case the court, without the intervention of a jury, proceed to pass sentence according to law and the nature of the offense.

In the opening of our defense it has also been urged that if there was any impropriety in the conduct of the court respecting the trial of Fries on the first day it was amply compensated for by the conduct of the court on the second day, in having called in the written opinions, and the copies which had been taken, and giving the counsel liberty to proceed in such manner as they should think proper.

In answer to this the honorable managers have replied that it was then too late. The mischief that had been done the first day was irretrievable, the sin that day committed was inexpiable: Nay, one of the managers has told us that the excuse is as absurd as would be the excuse of a person who, having thrown a firebrand into combustibles

and set the whole neighborhood in a blaze, should attempt to excuse himself by saying "he had again got into his possession and extinguished the brand, with which he had enkindled the fire, although the conflagration was still extending, and consuming every thing before it;" a most happy simile.

But let us examine wherein was the mischief so irretrievable—the sin, so inexpressible! neither more nor less than in this, that as the written opinion only contained the impressions on the minds of the judge, the destruction of that written opinion would not prevent the same impressions remaining on their minds; and those impressions would be as difficult to remove after the opinions were called in as before. 'Tis all very true; but how came the judges to have on their minds those impressions. Not from having committed them to paper, but from their correct knowledge of the law. And how were those impressions to be removed? certainly by no means, unless that correct knowledge of the law could also be removed. To accomplish which I know of no means that could be used, unless the judges could have been supplied with a quantity of our India rubber, or with a few barrels of the waters of Lethe, with the one to rub out and efface from their minds all their legal knowledge, or by copious draughts of the other, to wash it away. But, sir, I have not made, nor shall I make any use of the proceedings of the second day as an excuse for any impropriety of the court on the first; I only consider them as incontestible proofs that the court had no other object in view on either of those days than conscientiously to discharge their duty, by giving Fries a fair and impartial trial, that if he was guilty he might be punished—if innocent, acquitted. I deny that the court was guilty on the first day, of any impropriety; I take higher ground and have contended, and do contend, that the conduct of the court on the first day was correct and proper, and during the whole trial I find nothing improper in their conduct except their almost humiliatingly soliciting the counsel of Fries to do their duty, instead of committing them to jail for the impropriety of their conduct, which the court ought to have done;

but even in this the court has afforded the strongest proof of their solicitude that Fries should have every legal and constitutional benefit of counsel at his trial.

Reflect also that at the time when Mr. Lewis thus contemptuously dashed from his pure hand the contaminating opinion he had not read a single word nor received the least intimation of its contents; nor did he know its contents until long after; and yet he instantly formed the determination not to appear for Fries, and to advise their client not to accept the assignment of any other counsel, should the court offer it. Whence this conduct? how did he know the opinion was not favorable to his client? his conscience told him it was not. His own great legal knowledge confirmed to him the truth. He well knew the law; he was acquainted with the correct decisions which had been before given. He well knew the great legal knowledge of the judge, who on this occasion presided; he was certain my honorable client could not but concur with his brethren. He acknowledges they had no hope to change the opinion of the court, and that they had not the vanity to suppose the jury would, under their influence, decide the law contrary to what the court should direct; therefore that they had no hopes of the acquittal of their client by the jury on the trial, whatever services they were permitted to render him; and therefore, as the only chance, which they had to save his forfeit life, they assumed that line of conduct which has been disclosed in the evidence, when Mr. Lewis, in giving his testimony, said: "Judge Peters asked us on the next day whether if the court had got into a scrape the first day, the counsel would not let the court get out of it." "No," said Mr. Lewis, "we were determined not to let them get out of it, as the only means to save our client's life," and in the conclusion of his testimony he repeated that they were actuated in their conduct from considering it the only chance they had to save the life of their client, and not from any other motive. And Mr. Dallas also observed in his testimony that when the court on the second day pressed them to continue their services as council of Fries they refused, determined not to depart from the policy they had adopted, and

to withdraw as the most probable means of benefiting their client.

I shall conclude what relates to this article by observing that the conduct of Fries' counsel to the court on that trial was such as nothing can excuse. It can only be palliated by the reflection that for his crimes he was liable to suffer death. Feelings of humanity and compassion, independent of interest, might excite in their bosoms an earnest anxiety to save his life, this may serve to mitigate censure; but even those feelings, however amiable, ought not to be gratified at the expense of national justice nor by an endeavor to stamp upon judges of uprightness and integrity the dishonorable charge of partiality and oppression. I fear, sir, I have been tedious on this article, but it will be considered that, whatever may be my own sentiments of the futility of any part of these charges, I cannot determine how far this honorable court may correspond with me in sentiment. Nor can I do otherwise than treat as of consequence any charge brought forward by the honorable house of representatives or not consider it as being of importance.

I will now, Mr. President, proceed to those articles which arise out of the trial in Virginia; and I find it stated in the beginning of the second article, that my honorable client went there prompted by the same shameful spirit of persecution and injustice; the truth of which I am ready to acknowledge, after having satisfactorily proved that at Philadelphia he had not shown in any manner whatever a spirit of persecution and injustice, but had acted with uprightness and integrity; and that his greatest fault, on that occasion, was, that he did not commit the counsel of Fries to the public jail for their insolent, their arrogant, their contemptuous behavior to the court. And I flatter myself that I shall be able to show that my honorable client acted with the same uprightness and integrity in the case of Callender as I have shown he acted in the case of Fries.

The second article goes on to charge Judge Chase with overruling the objection of John Basset, who wished to be excused from serving on the jury in the trial of Callender,

and causing him to be sworn, and to serve on the said jury by whose verdict Callender was convicted.

This article requires a discussion of the law relating to challenges of jurors—and whether Mr. Basset was legally sworn on that jury. And here again as well as in the case of Fries, I meet with the most perfect novelties, for except in those trials I never heard of jurors, when called to be sworn, examined on oath whether they had formed—or formed or delivered, or whether they had formed and delivered an opinion on the subject about to be tried. And here also let me observe that there is no just ground for the charge that Judge Chase from partiality administered the oath differently in Callender's case from the manner in which he administered it to the jurors in the case of Fries, for Mr. Rawle, referring to his notes taken at the time, has told us that in the case of Fries, one or two of the first jurors were only asked whether he had formed an opinion; after which the question was put, whether he had formed or delivered an opinion, but ultimately the question asked was, whether they had formed and delivered an opinion, which question was put to the greater part of the jurors; so that the interrogatory ultimately fixed upon in the case of Fries is the same which was put to all the jurors who were interrogated in the case of Callender.

I have, Mr. President, been in the practice of the law for thirty years. Before the revolution I attended, two or three years, the two counties on the Eastern shore of Virginia—Sussex County in Delaware—and Somerset and Worcester in Maryland, since the revolution I have constantly attended the general courts on the Western and Eastern shores of Maryland, and the civil and criminal courts of Baltimore County—and for about six years several other counties in Maryland. In the whole course of my practice, I have never known a single case either civil or criminal, in which the jurors have been, when called to the book, demanded to answer upon oath either of the aforesaid questions which the defendants counsel requested to be put to them.

If either party choose to challenge a juror for favor, on



account of declarations made by the juror, the only ground for it is that he has used expressions showing his determination to decide for one party or the other without regard to truth and justice. In which case the party makes his objection to the particular juror, specifying the expressions uttered by the juror indicative of such improper determination, and produces witnesses to establish his objection; for the juror cannot be examined on oath to substantiate the charge—and, unless by mutual consent, the objection made must be decided, not by the court, but by Triers. And the only matter to be decided is whether the juror has made any declaration, of a design to give a verdict one way or the other, whether right or wrong, for if the juror made the declarations from his knowledge of the facts in the case, this would be no cause of challenge, nor any objection to his being sworn on the jury. And as the juror himself against whom such objection is made cannot be examined on oath, it follows of course he cannot be challenged for having formed an opinion, but only for having delivered it, as third persons cannot know of an opinion being formed but by its having been delivered. And as I have observed already, even the delivery of an opinion is no cause of challenge, if it appears to have been founded upon the jurors knowledge of facts, and not from partiality—in consequence of this principle of law, it can be no objection against a juror being sworn, even though he should have the most perfect knowledge of every fact relative to the issue, to try which he is about to be sworn; on the contrary, the principle reason assigned why trials ought to be by jurors from the vicinage is the presumption that they will be best acquainted with the facts which will be put in issue for their decision.

Suppose a person, summoned as a juror to try an indictment for assault and battery or any other offense, had seen the offense committed and perfectly knew the offender, it would be no cause of challenge against the juror, nor could he for that reason be rejected at the trial—on the contrary the law considers him the better qualified to serve in that

case as a juror in consequence of that knowledge. If in the instance I have put, such jurymen had declared that the criminal had committed an assault and battery, and that he was determined to find him guilty, this declaration being founded on the knowledge of the juror as to the truth of the case would be no ground for challenge—to support a challenge, the juror must show an intention to act partially through favor or malice. It is therefore no objection to a person serving as a juror because he is also a witness.

And so far is it from being the case that a jurymen's knowledge of the law, or his having declared his opinion of the law arising in the case to be tried, should be a cause of challenge, that if two or more persons are indicted in the same indictment for the same offense, and one is tried and convicted, a jurymen, who served on that trial may be sworn on the subsequent trial of the other person joined in the indictment, and cannot be challenged, although as to the law arising in the case he had not only declared his opinion, but even declared it on oath in the former trial. So also, is the case of a judge, whether he is to decide the law only, as in jury trials, or the law and fact both, as here in the case of impeachments; his knowledge of the facts in the cause is no objection to his acting as a judge, and he may be called on to give testimony and yet give his decision in his judicial capacity. In support of these principles in addition to the authorities already adduced I will trouble this honorable court with Brooke's abridgment Title, Challenge pl. 90, where he says, it is a cause of challenge to the favor if the juror has declared that should he be empanelled he would give a verdict for the plaintiff.

This authority shows that a declaration, as I have contended, must have been made; but I shall now also show that as I have before stated the declaration must be made from motives of partiality, that is, from favor or ill-will to the one or the other party. For this purpose I will read 2d Hawkins, Chap. 43, Sec. 28. "It hath been allowed a good cause of challenge on the part of the prisoner, that the juror hath declared his opinion beforehand, that the

party is guilty or will be hanged, or the like. Yet it hath been adjudged that if it shall appear the juror made such declaration from his knowledge of the cause, and not out of any ill-will to the party, it is no cause of challenge." This doctrine is as old as the seventh of Henry the sixth; during whose reign it was determined that though a juror had said twenty times that if he was sworn he would give his verdict for one of the parties, yet if he said this from the knowledge which he had of the matter in dispute and the truth of the case, such juror was indifferent; but if he said this from any affection to the party, the juror in that case was favorable, and thus Judge Babington directed the Triors; see Brooke's abrid. Title, Challenge, pl. 55.

In Viner's abridgment 21st Vol., page 266, we find the same principle recognized. It is there stated that "if a juror says twenty times that he will pass for the one party, this is not a principle challenge, for it may be that he speaks it for the notice which he has of the thing in issue and not for affection." A decision in the seventh of Henry sixth, and another in the twentieth of the same king are referred to; and the authority from Brooke, Challenge, pl. 55, before mentioned, is in the note introduced with approbation.

In 2d Hawkins, Chap. 43, Sec. 29, we find in confirmation of the positions I have taken, the law thus declared: "It hath been adjudged to be no good cause of challenge, that the juror had found other persons guilty on the same indictment, for the indictment is in judgment of law several against each defendant, for every one must be convicted by particular evidence against himself." The same principle is established by the decisions in 4th Vol., State Trials, pages 141 and 175 (which he turned to and read), 2d Vol., State Trials, 255 and 256, also show that though a person is a witness in the cause, it is no reason he should not serve as a juror, and also that the knowledge which a juror may have of the case to be tried by him, is no disqualification. It also shows how questions of this nature are to be tried.

And to prove that the knowledge of the facts to be decided doth not in any degree interfere with the right of a judge to decide in the case, and that any member of this honorable court might be sworn as a witness and yet give his decision in the cause, I will read an authority from State Trials, Vol. 2d, page 632, where Lord Strafford, on his trial, puts this question to the court, "if I shall name any of the house of lords as my witnesses, can that exempt them from being judges?" The answer given by the lord high Steward was, "no my lord, if your lordship has any witnesses among my lords here, they may well testify for you and yet remain still in the capacity of your judges, for my lord of Strafford had a great many witnesses who were peers."

Thus, though in this instance the judges had to decide both the law and the fact, the knowledge of any one of them in no respect formed an objection to his deciding as a judge.

I have said also that a juror cannot be examined on oath to prove that he has made any declaration which would be a good cause to challenge him for favor. To support this position, I will trouble the honorable court with two authorities—the first from Leatch's Edition of Hawkins, 2d Vol., page 589, in the note. In the text is mentioned as a cause of challenge, "that a juror hath said the prisoner is guilty or will be hanged or the like, etc." In the note it is stated that the prisoner shall not examine a juror concerning such matter on a *voir dire*, because it sounds in reproach.

The second from Cooke's case 1 Salk 153, where it appears that Cooke being indicted for high treason, offered to ask jurors when called, in order to challenge them, "if they had not said he was guilty, or would be hanged." And by the court: this is a good cause of challenge, but then the prisoner must prove it by witnesses, not out of the mouth of the juror.

With these observations I shall rest the question as to what disqualifies a juror, and shall proceed to examine

whether Basset was improperly or illegally sworn upon that jury which tried Callender. I have shown that he might not only have formed, but delivered an opinion respecting the conduct of the criminal, and yet that unless his declarations tended to prove that he did not mean to give a just and impartial verdict, but to decide against propriety and right, he was competent to be sworn on the jury. The question which was put to the jurors by the court, no law required to be put, nor was any of the jurymen bound by any law to answer the question—and the judge was perfectly correct, when he said, upon the counsel insisting that the indictment should be read to the jurors, and that they should then be asked if they had formed or declared an opinion as to the charge in the indictment, that the court had already indulged them beyond what they were entitled to by law.

But to proceed with Basset. What was his situation? He expressed no wish to be excused, provided there would be no impropriety in his being sworn, but from a delicate scruple he informed the court, that he had seen in the newspapers extracts said to be taken from "The Prospect Before Us;" that he had no knowledge whether they were truly extracted, but if they were and the context did not explain away the apparent meaning of the extracts, he had made up his opinion unequivocally that their author came within the provisions of the sedition law. But let us suppose that Mr. Basset had actually seen and read "The Prospect Before Us," and had found the extracts fairly taken from it and had formed and declared his opinion; that it was a publication which came within the sedition law; as to Callender, it would have amounted to no more than this, that if he was the author or publisher and could not prove the truth of his charges and had published them maliciously, to defame the President of the United States, he ought to be punished. And what honest man ever thought differently? None, whom I ever heard speak of the book. Whether the extracts he had seen agreed with the contents of the book—whether the context supported

the apparent meaning—whether the charges were true—whether Callender was the author or publisher and if so, whether he wrote or published them maliciously to defame, etc., were subjects of which Mr. Basset was ignorant, and on which he had declared no opinion. On these questions he was at liberty freely to decide according as the evidence in the case should justify him.

But it is said, this opinion formed and declaration made, was improper, because they say the criminal ought to have the law and the fact both decided by the jury; and a juror should have his opinion as little made up on the law as on the fact. Hence then, we are to infer, that as want of knowledge of the law is the best qualification for a judge, so the ignorance of the law is the best qualification for a juror; and yet we are told, that a juror has a constitutional right to determine the law, and that too, in defiance of the opinion of the court! Thus it seems the more ignorant they are, the greater our security for obtaining a just decision! I admit, the greater their ignorance, the better will they be qualified for taking what is contended to be the due impression from the exercise of what we are told is the constitutional right of counsel!

But in this case, as appears from the testimony, there were others beside Callender concerned in printing and publishing "*The Prospect Before Us*;" suppose some other person, for instance Mr. Rind had also been indicted, that on the trial of Rind Mr. Basset had served as a juror and had found him guilty; that Callender had afterwards been brought to trial and Mr. Basset had been called as a juror, he could not be set aside according to the authorities I have produced, although in the case of Rind he had and that on oath declared his opinion of the law.

Mr. Basset, although being possessed of a liberal fortune, he doth not now practice, was bred to the law; his legal knowledge was such that he could not doubt but that such publications as "*The Prospect Before Us*" came under the provisions of the sedition law. And it is for this reason that the managers contend he ought not to have been

sworn. Yes sir, this very knowledge of the law which rendered him a more proper character to serve on the jury, is by the honorable managers insisted on as what ought to have been his disqualification! And yet they contend that the jury have the uncontrollable right to decide upon the law!

Suppose Mr. President, a person to be indicted for an assault and battery, or for burglary, if any person should be summoned on the jury, who had so much common sense and general information as to know that the man who comes behind the back of another and knocks him down is guilty of an assault and battery, he would be unfit to serve as a juror in the first case; or to know that if a man breaks into a dwelling house in the night time and steals therefrom, such offender is guilty of burglary, he would be equally unfit in the last case.

Hence then it follows, that in the opinion of the honorable managers, that as judges ought to have no previous knowledge of the law relative to cases which are to be tried before them; so also, jurors ought not to have any knowledge of what is the law, in cases to be tried before them; and that if any juror with such legal knowledge should be summoned he ought not to be admitted to serve, unless indeed he can be rendered properly qualified by the application of the India Rubber, or by the use of the Lethean waters, by the one mode or the other to be reduced to that happy state of ignorance thought by the managers to be the essential requisite of a juror.

I would before I conclude this subject, remark upon an observation made by one of the honorable managers (Mr. Campbell), he has charged Judge Chase with having caused Mr. Basset to be sworn as one of the jury for the very purpose of convicting Callender, from his knowledge of Basset's political principles.

My worthy colleague (Mr. Key) has with great strength of argument shown that Judge Chase could not from the facts proved, be otherwise than a stranger both to the person and to the political principles of Mr. Basset. But I am

aware that in reply it will be said the declaration Mr. Basset made in court showed what were his political sentiments. He only there declared that "The Prospect Before Us," if the extracts he had seen were justified by the book was a seditious publication. This could be no proof that he was a Federalist. I never knew a gentleman of any political principles that did not uniformly declare, that if the sedition law was constitutional, that publication was clearly within the provisions of the law. Even his counsel have declared that they did not appear on his account, that they despised the wretch and considered him as a disgrace to society. They have declared they had no hopes of saving him unless by establishing the unconstitutionality of that law.

But even had Judge Chase known the political principles of Mr. Basset to have been Federal, it would not have justified him in excusing him from being sworn, nor would he have been justified in setting aside a juror because he was a Republican, unless there had been in each case some other legal objection. There is no distinction between the two cases—the political principles of a man is not the test of his fitness to serve as a juror. If Mr. Basset had been exempted from being on the jury in consequence of the scruples he suggested, the court must have exempted all who should make similar excuses, or they would have given just cause for complaint. It was the duty of the court to direct the jurors to be sworn as they were called against whom there was no legal objection. I flatter myself I have sufficiently shown that against Basset there was no such objection—that the judge was not only free from impropriety in directing him to be sworn, but that his conduct would have been censurable had he acted otherwise; and here, sir, I conclude my observations upon the second article of impeachment.

I now come, Mr. President, to the third article, wherein my honorable client is criminally charged for the rejection of the evidence proposed to be derived from Col. John Taylor.



In this part of the case the facts are admitted. The next question of law, therefore, which presents itself for discussion, is whether or not Col. Taylor's evidence ought to have been received, or was properly rejected. Here again I must observe that the honorable managers to support their charge, resort to principles which are to me, to the last degree, strange and novel. We are told that the court has no right to order questions which are meant to be put to a witness, to be reduced to writing. Nay, that the court have no right to know what evidence is meant to be given by the witness, or its connection with other testimony, or its bearing on the cause, but to receive it drop by drop, as the counsel think proper to deal it out. In answer to these extraordinary ideas which we have had thus introduced, I must be permitted to assert, that the court have, in my opinion, an undoubted right to require of the counsel that they should open their case, explain the nature of the evidence meant to be given, and on the production of a witness, state what they expect to prove by such witness. In the course of my practice it has been the usual method of proceeding for counsel to conduct themselves in this manner. And on this subject, M'Nally, in his rules of evidence, page 14, expressly lays it down as a rule, "that counsel ought not to call a witness without first opening to the court the nature of the evidence they intend to examine to. This has been often solemnly adjudged, though not strictly adhered to in practice." And in page second he gives us as the first rule, "that no evidence ought to be admitted to any point but that on which the issue is joined." But how is a court to prevent and it is only the court which can prevent, evidence being admitted which is not pertinent to the point on which the issue is joined, unless they are first informed what evidence is meant to be given? It is then upon the authority of M'Nally established, that the court have the legal right to know what counsel mean to prove by a witness—and having that right, they may exercise it whenever in their discretion they may think it necessary.

To determine, therefore, whether they acted correctly in

rejecting the testimony of Col. Taylor, let us examine what testimony they hoped to obtain from him and for this purpose what were the questions proposed to be put to him. They were:

1st—Did you ever hear Jno. Adams express any sentiments favorable to monarchy or aristocracy, and what were they?

2d—Did you ever hear Mr. Adams, while vice-president, express his disapprobation of the funding system?

3d—Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration of British debts and also against the bill for suspending intercourse with Great Britain?

Col. Taylor's testimony was offered as being relevant only to one set of words stated in the two counts of the indictment, to-wit, "He (meaning the said president of the United States) was a professed aristocrat. He (meaning the president of the United States) had proved faithful and serviceable to the British interest; (innuendo) against the interest and welfare of the United States."

Need I state to this honorable court that words, which do not in themselves or on the face of them, purport any thing criminal, cannot be made so or considered as libellous, but by laying an innuendo giving them a criminal meaning, without which they would be innocent, and also that the criminal meaning laid in the innuendo must be strictly proved.

Let us now examine the set of words to which Col. Taylor's evidence was meant to apply, they were without any innuendo, as follows: "He was a professed aristocrat, he had proved faithful and serviceable to the British interest."

This sentence consists of two separate distinct clauses or parts; the first, that "he was a professed aristocrat." The second, that "he had proved faithful and serviceable to the British interest." I ask this honorable court if either of these clauses or parts of themselves and without an innuendo carry with them any charge of criminality or any thing libellous? To say that a man is an aristocrat, a dem-

ocrat, or a republican, is not of itself charging the person with any thing criminal nor is it slanderous, unless indeed the charge is accompanied with an innuendo, stating that by the epithet so used, something very bad was intended; and that government would indeed merit contempt in which a person should be punished upon such a charge. So also, to say that a man had been faithful and serviceable to the British interest charges him with nothing criminal and therefore cannot be slanderous, because the British and the American interest in many instances have been and may be the same.

There may be a variety of instances in which the interest of two nations may concur. There have been many in which the interest of America and of Britain did concur; many also in which the interest of America and France have combined. In the first instance a man may have been faithful and serviceable to Britain; in the other to France, without the violation of any duty to the United States, without having been guilty of the least criminality.

The sentence then taken altogether connecting the two clauses, do not of themselves import any thing criminal and consequently is not slanderous, if it remained without any innuendo, and if it was free from an innuendo being not slanderous, would not require any evidence relative thereto—nay, it would be no part of the charge put in issue, for in legal construction it is only such part of the publication stated in an indictment which is slanderous that is the point in issue.

I will now, sir, read that part of the indictment in connection with the innuendo: "He (meaning the president of the United States) was a professed aristocrat." Here there being no innuendo, this clause or part of the sentence remains in its primitive innocency. "He (meaning the president of the United States) had proved faithful and serviceable to Great Britain." This of itself as I have observed is perfectly innocent; but here comes the innuendo with its sting in its tail—"Innuendo, against the interest and welfare of the United States of America." Thus it

was only the latter clause in the sentence that was presented as being libellous; and how was that part of the sentence to be justified? By showing that the president had, in the high station he had occupied prostituted his character by sacrificing the interest of the United States to the interest of Great Britain. And how was this justification to be proved? Not by any answer Mr. Taylor could give to the first question, for that as far as his answer could have relation, could only relate to the first clause; but that clause being of itself inoffensive and not made criminal by any innuendo, was no part of the criminal charge in issue, but was merely introduced as being part of a sentence, the latter clause of which was only charged to be criminal. Any evidence from Col. Taylor as to the first clause was therefore totally irrelevant, as not going to the point in issue, and as only going to prove the truth of what was neither stated nor relied on as being criminal; and therefore was properly rejected by the court.

As to the second question, to wit, "Whether Mr. Adams, while vice-president, had expressed his disapprobation of the funding system?" The question could not be in any degree relevant to the one or the other clause in the sentence—whether Mr. Adams expressed his disapprobation while he was vice-president, of the funding system, or not, could in no respect go to prove or disprove his being a professed aristocrat, or his having sacrificed the interest of the United States to the interest of Great Britain. The court therefore considering this question totally irrelevant to the "point in issue," did as was their duty to do, they refused to suffer it to be put to the witness.

So much for the two questions. We now come to the third, respecting the votes of Mr. Adams, when vice-president, against the bill for the sequestration of British debts, and the bill for suspending intercourse with Great Britain. For the conduct of my honorable client in refusing to permit this question to be put to Col. Taylor, two reasons may be assigned; the first, that if the fact was as stated, it could not be proved by Col. Taylor. The second, that if the fact was

established, it would be totally immaterial to the issue. Col. Taylor's evidence was not the best which the nature of the case admitted. I will not say that the traverser, in order to prove this vote, was under the necessity of procuring a copy from the journal of the senate, properly authenticated by their clerk, but he certainly ought at least to have produced a printed copy of the votes and proceedings of the senate as published by them. One thing at least is certain, that the traverser could not consistently with rules of law, give parol evidence to establish the vote of Mr. Adams, and therefore that Col. Taylor could not be legally examined on that subject. But I will go further in defense of my client and will say that if they had had the best possible evidence of the fact; if they had had an attested copy from the records of the senate, the judge would have departed from his duty if he had permitted the evidence which was wished to have been obtained from Col. Taylor, to have been given to the jury. Ought any evidence to be given to a jury which is not proper and pertinent to prove the fact in issue, or to prove some fact from which the fact in issue ought legally to be inferred—evidence not relevant to the point before the court and jury? Was not, as to this part of the charge, the fact in issue, whether Mr. Adams had swerved from his duty by intentionally prostrating the interest and welfare of his country to the interest and welfare of Great Britain. Should not a charge of so atrocious a nature be proved by some direct act of this criminal sacrifice of the interests of the United States to the interest of Great Britain, or by proof of some other act from which such criminal sacrifice must and ought on principles of law to be clearly and necessarily inferred? And what was the proof proposed to be offered for this purpose? That upon the question whether British debts should be sequestered, and whether our intercourse with Great Britain should be suspended, after full discussion one-half the members of the senate voted in favor of those measures, and one-half of the senate against them. And that in this situation Mr. Adams thinking the measure of too hazardous a nature, and one which might involve our country in a war, did

not choose to take upon himself so great a responsibility as to give his casting voice in the affirmative.

I have, Mr. President, neither time nor inclination to enter into a discussion of either the propriety or policy of those measures, but I have no hesitation to express my belief that the honorable members who voted for or against those measures, were equally actuated by the same purity of motive. That those who voted on the one side or the other acted from the sincerest desire to promote what they respectively considered the best interests of their country.

Shall, then, the rejection of the evidence that Mr. Adams, on a measure *in fieri*, on which the senate was equally divided, gave his casting vote with the senators whose political sentiments accorded with the then majority; and which evidence, if admitted, would have proved nothing, be considered as a ground of impeachment! I say evidence, which, if admitted, would have proved nothing; for that act of Mr. Adams certainly would not have proved that he had corruptly and wickedly sacrificed the interest and welfare of the United States to Great Britain; nor would it have proved any thing from which such sacrifice ought legally and necessarily to be inferred. Where is the man who would dare to say that the members of the senate who voted for or against the bill for sequestration of British debts, and the suspension of our intercourse with Great Britain, acted from corrupt motives? Is there a member of this honorable court who believes that the senators who voted against those measures were actuated by a desire to promote the interest of Great Britain at the expense of their own country? Or that those who voted in favor of those measures were actuated by a desire to promote the interest of France at the same expense? The heart of every member of this honorable court, I am confident, revolts at the idea! Ought then any judge to have suffered this act of Mr. Adams to have been offered to a jury as evidence directly to establish that he had wickedly and corruptly preferred the interest and welfare of Great Britain to that of the United States, or as evidence from which the jury ought, upon legal principles, necessarily to infer that he had thus acted.

The judge who would have permitted such evidence to have been given for such purpose, in my opinion, ought much rather to be impeached for his conduct than the judge who should reject it.

It is the sole province of the court to determine what evidence shall go to the jury, either as proper, directly to prove this fact in issue, or to prove any facts from which that fact ought to be inferred. The court are the sole judges of the competency and admissibility of the evidence—the competency depends upon its legality; the admissibility upon its relevancy to the question in issue. If illegal, it is their duty to reject it; but though legal in its nature, yet if not relevant to the point in issue, it ought equally to be rejected; because its production only wastes time and has a tendency to mislead the jury.

The right of the court to decide what evidence shall go to the jury I never heard questioned till in the course of this trial. The honorable managers appear disposed to advocate a different doctrine, and as they claim the right that the jury should decide the issue without regarding the opinion of the court as to the law, so they seem to think that the court ought not to restrict the evidence to the jury. And hence they have expressed some indignation against my honorable client, because when he told the counsel in Fries case that they might go on as they pleased, but still subject to the direction of the court as to what evidence they might offer. On that occasion they exclaimed: "The court took upon themselves to decide what evidence should go to the jury! But perhaps that evidence which might have been rejected might have influenced the decision of the jury, and as the jury have a right to decide the law, uncontrolled by the court, they ought to have before them all the evidence which might possibly influence their decision!" Charming doctrine! Thus the jury are not only to decide the law on the issue, but likewise all questions of law which arise upon the proceedings in the cause and upon the evidence that is to be admitted. The honorable managers seem to forget that it is only in consequence of the right of the jury to give a general verdict that they get incidentally

the power of deciding the law in any case, but that this cannot in any manner enable them, either as to power or right, to have any control over the court in any collateral questions. The maddest enthusiast that ever yet advocated the rights of jurors, has never questioned the right of the court to determine upon the competency and admissibility of evidence. Such being the law it was the duty of Judge Chase, when the question meant to be established was that Mr. Adams wickedly and corruptly sacrificed the interest of the United States to Great Britain contrary to his duty, to prevent the vote of Mr. Adams on that occasion being given in evidence to the jury, either as proper directly to prove the fact or from which they ought necessarily to infer it. And I again repeat if he had suffered such evidence to have been given to them as proper and relevant, he would have been much more deserving of impeachment.

I have stated that there is two ways of proving the issue—either by directly proving the fact in issue or by proving some fact from which the fact in issue ought legally to be inferred; and that in the one case and the other the court are the judges as to the competency and the admissibility of the testimony. But I go further, it is the court who have a right to determine whether or not the fact in issue ought to be inferred from a fact proved, or what fact, being proved, will justify a jury in inferring and accordingly finding the fact in issue. I will, sir, explain my meaning. The question in issue is a grant or no grant of a tract of land; the grant is the fact to be established; no grant can be produced, but evidence is given of possession for a great length—a regular transference of the property as having been granted—payment of rents to the successors of the supposed grantors, etc., the court not only determined what testimony is proper to establish these facts, but they direct the jury that if they believe the evidence, they then ought to find that a grant had been given. On this point I refer to Cowper, p. 112, and 12 Coke 2. So, sir, in an action of *indebitatus assumpsit* for money due, the defendant pleads the action of limitation, and the plaintiff replies a promise to pay within three years. If



on the trial of the cause the plaintiff proves an acknowledgment of the debt within the limited time, the court will instruct the jury that if they believe that fact they ought to find from it, as being sufficient evidence for the purpose, the fact in issue, that he did promise to pay. Yet if the jury was to find a special verdict, stating that within three years the defendant had acknowledged the debt, the court could not give judgment, but must order a *venire facias de novo*; because the jury would not have found the fact in issue, but only a fact which was, as evidence, sufficient to have justified them to have found by their verdict that the defendant did assume. Again, in the case before supposed, evidence was given to the jury that the defendant had acknowledged the debt as aforesaid, the court would instruct the jury that upon that evidence they ought to find the defendant had promised, and if the jury did not give their verdict for the plaintiff, the court would grant a new trial. So, sir, in an action of trover and conversion. If it was proved that the defendant had the thing in possession for the conversion of which the suit was brought, and evidence is given that the plaintiff demanded the article from the defendant, and that he refused to deliver it, though this is not itself a conversion, and if the jury was to find a special verdict stating these facts, the court could not give judgment, yet the court would direct the jury that upon such facts being proved, they ought to find the fact in issue, to-wit: the conversion, and if the jury was not to find for the plaintiff the court would grant a new trial. Again, in the case of an action brought to recover money and the statute of limitation pleaded—if the defendant acknowledges the justice of the debt, but at the same time absolutely and unequivocally declares that he never will pay any part of it, the court would instruct the jury that upon such evidence they could not find for the plaintiff, for that the acknowledgment of the debt being only presumptive evidence of a promise to pay it, that presumption was taken away when acknowledgment was accompanied with a direct unequivocal declaration that he never would

pay any part of it. So in the case of trover and conversion, if the thing in question was large, heavy and unwieldy, as a large piece of mahogany or other timber, and when the delivery of it was demanded, the defendant was to refuse troubling himself on the occasion but to direct him to where this ponderous article lay, and tell him that he might take it into his possession when he pleased; the court would certainly say there was no proof of conversion—the *prima facie* evidence being defeated by the circumstances of the case.

I have introduced these cases by way of illustration; and to show that the court determines what is proper evidence to prove the fact in issue—from what fact the fact in issue may be inferred—and also what evidence is admissible to prove this secondary fact; and therefore as the vote given by Mr. Adams of which Callender wished to give evidence was not sufficient to prove directly the charge that Mr. Adams had wickedly, and against his duty, sacrificed the interest of his country to that of Great Britain—nor was a fact from which the jury on principles of law ought to have inferred it; and I am sure no person will attempt to support the contrary, therefore, that my honorable client instead of being impeachable for rejecting such evidence, would have exposed himself to censure had he admitted it.

Nor can I doubt but that the respectable counsel who were concerned for Callender, would have cheerfully acquiesced in and approved of my honorable client's conduct in this respect, had it not been for a cause, which they honestly acknowledged, their extreme ignorance of the law which relates to the doctrine of libels—and which had induced them to use every exertion to obtain a continuance of the cause to a future term, that in the meantime either their own offices, or under the instruction of some legal character, they might acquire a more accurate knowledge of that branch of the law. An indulgence that it seems they could not prevail upon the court to give—for the refusal of which, however, I hope my honorable client will not be thought impeachable.

I have now, Sir, finished my observations on the third ar-

ticle, and am under the direction of this honorable court whether I shall proceed to the fourth, which charges the respondent's conduct to have been marked during the whole course of the trial by manifest injustice, partiality and intemperance.

From the evidence it certainly appears that Judge Chase prevented the counsel from arguing to the jury that the sedition law was unconstitutional; and this seems to have given rise to a great portion of the altercation and ill humor between the court and the bench.

I admit that the constitution gives to a criminal the right of having counsel. But the constitution has not defined the rights or duties of counsel, or to what extent they are to exercise them. One thing, however, is certain—that they have no constitutional right to impose upon the court or to mislead the jury.

When Callender's counsel contended that if the jury have a right to decide questions of law, then the constitution being the supreme law of the land, the jury must of course have the power of deciding on the constitutionality of a law; the judge might well say it was a non-sequitur.

What has been allowed to the jurors as their incidental right on the general issue? Not to decide whether there is an existing law, or whether a law is in force, but to declare the true construction of an existing law, and whether the case at issue comes within the true construction of such law.

But those who contend that the jury have a right to determine the constitutionality of a law, insist not for the power of the jury to decide its true construction and whether the prisoner's case comes within it, but to decide whether what is produced as a law is not void, a mere nullity, a dead letter; or in other words whether such a law is in existence. The maddest enthusiasts for the rights of jurors—their most zealous advocates have never contended for such a right before the cases of Fries and Callender. Whether a law exists, whether a law has been enacted—whether a law has been repealed—whether a law has be-

come obsolete or is in force? The decision of these questions have always been allowed the exclusive right of the court. The power of the court to decide exclusively upon these questions has never been before controverted. Nay, the very right claimed on behalf of jurors, that they may determine what is the true construction of the law, and whether the case is within its provisions, of itself necessarily presupposes, and is predicated upon the existence of a law, the true construction or meaning of which they are to determine. It has indeed been seriously questioned, and that by gentlemen of great abilities, whether even the judiciary have a right to declare a law passed by the legislature to be contrary to the constitution and therefore void! I shall not enter into an examination of that question; but I have no hesitation in saying that a jury have no such right—that it never was intended they should have such right, and that if they had the right, we might as well be without a constitution.

The first specific instance of my client's unjust, partial and intemperate conduct, which is stated in this fourth article is, that he compelled the traverser's counsel to reduce to writing the questions which they meant to propound to Col. Taylor. The correctness of this procedure will depend on the question, whether the court had by law such a power, for if such a power was possessed by them, it is to be presumed that they, on that occasion, exercised it according to their best discretion, nor can it be inferred that their conduct was criminal, because the procedure was novel in Virginia. There are cases in which the practice of a court may be considered the law of the court; but these are not in any manner analogous to the case in question; nor do I find that the practice of the state courts is obligatory "in any case of this kind on the courts of the United States." My honorable client did not consider what was usual in Virginia, but what was correct and proper, he knew that the law authorized him to make this demand. In Maryland, where he imbibed his legal knowledge, and where at the bar and on the bench he had carried it into practice,

nothing was more common than for questions to be reduced to writing at the request of counsel, or at the request of the court. If counsel doubt of the propriety of the evidence meant to be drawn from the witness, or the correctness of the question meant to be propounded to him, they have a right to request it to be reduced to writing. So also, if the court, without whose approbation no testimony can be given to a jury, and whose duty it is to prevent improper testimony to be given, has reason to suspect an intention to introduce such evidence, they have a right, and they ought to require the questions to be reduced to writing, that there may be no misapprehension of the tendency of the question, and that they may more delicately decide whether it is proper to be put to the witness. And in this case the counsel were not required to reduce their questions to writing in the first instance, or before they had stated what they meant to prove, as has been suggested. When Col. Taylor was called and sworn, the court desired to be informed what they meant to prove by him. McNally is an authority that in so doing they acted legally. The counsel stated the facts; to prove which Col. Taylor was called; upon which, the court doubting the admissibility of the testimony directed the question to be reduced to writing for their consideration. It cannot for a moment be seriously contended, but that the court had a right so to do. As my respectable colleague (Mr. Key) has observed, the practice of this honorable court during this trial, has perfectly sanctioned that part of my client's conduct. If at any time a question has been put, the propriety of which has been doubted, it has been directed to be reduced to writing. It is true that this has been principally, when an objection has been made by the counsel—but there can be no doubt, that if any honorable member of this court had apprehended the question to be improper, the court would have had a right, and would have directed the question to be propounded in writing for their consideration. The propriety, the principle, in each case is the same. On this part of the charge I need not dwell any longer.

The next instance of the judge's conduct specified in this article is his refusal to continue Callender's case to the next term, notwithstanding the affidavit filed, and the applications made. On this subject I shall not make many observations as to the law; but I may venture to assert that the conduct of Judge Chase in this instance also appears to have been free from any corrupt or oppressive motive or design—no part of his conduct on this occasion has been produced to show that he entertained a disposition to prevent Callender from obtaining the testimony of his witnesses, or to deprive him of the necessary time to procure their attendance. Let it be recollected that the first affidavit prepared and proposed to be filed in order to obtain a continuance of the cause was a general affidavit. By the laws of England a general affidavit is not sufficient to entitle the party to a continuance—and upon the principles of law as adopted in England and in the United States, at least in Maryland, a supplemental affidavit cannot in a case of this nature be received.

If then Judge Chase had wished that Callender should have been, at all events, prevented from a continuance of his cause, he would have suffered them to have filed their general affidavit.

According to the laws of England, and so is the law considered in Maryland, to entitle the party to a continuance he must file an affidavit showing what witnesses he wants—what he expects to prove by them—that he has used due diligence to procure them, and that he has a reasonable expectation to procure their attendance at some time. Judge Chase, had he wished that Callender should be deprived of a continuance of his cause, would have suffered them to file their general affidavit, but what was his conduct? Desirous, they should not improperly and hastily commit themselves, and lose advantages to which they might be entitled, he gave them a caution, and time till next day to profit by it. On the next day they did, it is true, file a special affidavit; but this special affidavit so drawn up, under the caution given them by the court, is not such as can in any degree, stand

the test of legal investigation even under the authority, which one of the honorable managers (Mr. Rodney) has this day introduced. Callender did not in his affidavit state that he expected to be able to procure his witness at the next term, the term after, or at any term. He also stated that there were certain books necessary for his defense, but he did not state that he had endeavored to procure them before—or that he expected to get them against the next term. And surely, if when Callender wrote that libel, he founded any part of his charge upon books which had been published, he ought to have had them by him when he wrote and published, and to have kept them by him for his defense whenever he should be called upon to answer for that publication, and could have no right to claim a continuance for the purpose of obtaining such books. One of the honorable managers (Mr. Rodney) has this morning referred us to 6th Vol. Bacon's Abridgement, from page 650 to 652 upon the subject in contest, the mode of putting off a trial, and there as he acknowledges, and as the authority enforces "if there is any cause of suspicion, that delay is the object, the court should be satisfied from circumstances, that the person absent is a material witness—that the person applying has been guilty of no laches or neglect—and that he is in reasonable expectation of being able to procure his attendance at some future time." That the court had in Callender's case just reason to believe that delay was the sole object of the counsel, no person can doubt. Nay, the counsel themselves have upon oath declared that delay was their object. That they had no hope or expectation that witnesses could be of any service to them; that they considered Callender's cause desperate if the law was constitutional—and that their great object was to continue the cause to another court that it might not be tried before my honorable client, of whose conduct in the case of Fries they had heard, and against whom they had formed, it seems, the most decided prejudices.

This authority then produced by the honorable managers, perfectly justifies the conduct of my client, in refusing upon

that affidavit, to continue the cause to the next term. The court was then sitting to hear the charges brought before them—it was their duty to have them determined without unnecessary delay, that if the party was innocent he should be acquitted, if guilty that he should be brought to speedy punishment. The same honorable manager has from the same authority shown, “that upon the particular circumstances of the case the court will make a rule for putting off the trial of a cause to the second term after the rule for putting off the trial is made.” I admit the law, and will therefore readily admit that if an affidavit had been made by Callender stating that he expected to be able to prove certain facts, stating what the facts were, by witnesses, who from their particular situation, could not with any probability be produced before the second term, after the affidavit, and could then probably be had, the court might with propriety, and perhaps ought to have continued the cause to the second court, but no such affidavit was made; therefore not having made out such a case, they have no reason to complain that they had not the benefit of it. They did not even swear that they expected to be able to procure the attendance of their witnesses at any time whatever.

A case has also been referred to in Cowper’s reports, where the defendant, wanting the testimony of a witness who lived out of the jurisdiction of the court, and the court not having the power to issue a commission to obtain his testimony, the court declared that if the plaintiffs would not consent to have the deposition of such witness taken to be read at the trial, they would continue the cause indefinitely. The honorable manager has further said that though in England the court cannot issue a commission to examine witnesses, yet here the court has a power to issue a commission for that purpose. This honorable court will recollect that the case of Callender was a criminal prosecution, I doubt whether the court has any power in a criminal case to issue a commission to examine witnesses for or against the prosecution. I do not know of any law which gives them that power. If the honorable managers know of such a law, they will be so



obliging as to refer us to it. But I will take up the objection upon each view, suppose a commission might have been issued, the counsel of Callender did not apply to the court to grant a commission, and to continue the cause till the commission was returned. Suppose a commission could not be issued, Callender's counsel did not apply to the attorney general of the district for his consent, that these witnesses should be examined where they lived, and their deposition be read in evidence on the trial, they did not apply to the court for their determination, that the counsel for this prosecution should consent to this, and that if he refused, the cause should on that ground be continued. Had they prayed a continuance on either of these grounds, and it had been refused, they might have had some pretext under their authority for complaint, but this ground they never attempted to take.

Had they prayed for a commission, and the law authorized it, it is to be presumed the court would have granted it, if the court could not grant a commission, and the defendants counsel had proposed that the depositions of absent witnesses should be taken to be read at the trial, it is possible the court would have continued the cause unless the prosecutor would have consented that depositions should be thus taken. Hence therefore on no principle doth it appear that there was anything improper, incorrect or illegal in refusing a continuance of the case of Callender.

But sir, there is another ground upon which the conduct of the court was strictly justifiable in requesting to know by the deposition what the absent witnesses were expected to prove, and also in refusing to continue the cause.

Upon their own statement the witnesses wanted were only material to a few of the charges in the indictment. Their absence therefore could not be a sufficient reason to put off the trial. The attorney might have struck out of the indictment those sets of words to which their testimony was wanted and proceeded to the trial upon the other part of the charge. And as the punishment both as to fine and imprisonment was

discretionary, not exceeding a certain sum and time—Callender was equally in the power of the court, convicted on a part, as if he had been convicted on the whole of the charges—and the court having the discretion, and having refused a continuance for the want of the testimony suggested, had it in their power, when they passed sentence to throw out of their consideration, those parts of the charge for which the testimony was wanted.

And on this subject, a case suggested by my colleague (Mr. Key) is perfectly in point; he supposed the case of a person indicted for stealing a horse, saddle and bridle; to delay the trial, the prisoner suggests the want of witnesses—the court compel him to declare in his affidavit what he expects to prove by them. It appears that he only wants to prove that the bridle was his own! This surely would be no cause for delaying the trial. The prosecutor might instantly strike out of the indictment, the bridle, and there could not be the least pretext for not going to trial upon the residue of the charge, the stealing the horse and saddle. So in Callender's case, the want of witnesses to justify as to a few sets of words, could afford no reasonable cause why he should not be tried upon a dozen or more sets of libellous words, charged in the indictment, as to which he did not pretend to allege that he wanted a witness.

In Maryland, it has ever been the practice to try criminal prosecutions of what nature soever at the first court if practicable, and not to continue them unless some legal cause is shown. Judge Chase had been accustomed to this mode of procedure. It was in Maryland that he acquired the first rudiments of law. It was in that state that his legal knowledge was matured by practice.

Why should capital cases, rather than inferior crimes, be tried the first court? The honorable managers admit that it is the general rule not to continue, but to try at the first term, capital cases. Surely if indulgence, if delays is necessary in any case it is in a capital case, where life is at risk; where an injury if done is irretrievable!

There are many reasons which show the propriety that prosecutions of every kind should be decided with as little delay as possible. One of the principles as to criminal jurisprudence, as Governor Claiborne has justly observed, is that though punishments should be mild, yet they ought to be speedy; by having an immediate decision there is a greater certainty that the criminal shall not elude justice by flight. The expense whether to the criminal or to the public is increased by delay; delay also hazards the loss of testimony by the death or absence of witnesses; and therefore diminishes the chance of having justice done, either to the party or to the public, the one or the other of whom may be essentially injured for want of testimony, which might have been had if the trial had not been delayed; but even if witnesses live, and can be had at the trial, yet the lapse of time impairs memory, and their testimony cannot be relied upon in the same manner as if they were examined immediately after the transaction, when every circumstance would be fresh in their memory. These, with many other reasons which might be given, have actuated our courts of justice in Maryland never to continue criminal prosecutions of any kind, if it can be avoided; and show the propriety of their conduct.

The next specification in this article, of improper conduct in the judge, is, that he "used unusual rude and contemptuous expressions towards the prisoner's counsel; and insinuated that they wished to excite the public fears and indignation, and to produce that insubordination to the law to which the conduct of the judge did at the same time manifestly tend." As to this part of the charge, there is but little of a legal nature contained in it, I shall therefore hastily pass over it. If true, it seems to be rather a violation of the principles of politeness, than of the principles of law; rather the want of decorum, than the commission of a high crime and misdemeanor. I will readily agree that my honorable client has more of the "*fortiter in re*," than the "*suaviter in modo*," and that his character may in some respects be considered to bear a stronger resemblance to that of Lord Thurlow than to that of Lord Chesterfield; yet Lord Thurlow,

has ever been esteemed a great legal character, and an enlightened judge.

But let me ask this honorable court whether there is not great reason to believe that the sentiments my honorable client expressed with respect to the conduct of the counsel and their object was just and correct? What was the conduct of Callender's counsel? Was it not such as immediately tended to inflame the minds of the bystanders, and to excite their indignation against the court—and highly insulting to the judges? In the first place, they endeavored to obtain a continuance of the cause to next court, merely with an intention to procure delay, and to prevent the cause being tried before Judge Chase, acknowledging that they had no hopes or expectation from any testimony to save their client if the law was determined to be constitutional; and yet they brought forward their client to swear just what they pleased, in order to procure this delay, with respect to the necessity of witnesses, whose testimony they acknowledge they were conscious could be of no service to them—and yet they wished the bystanders to consider the court acting highly improper for not granting that continuance! Was this even to serve Callender? No, they avow they did not appear to serve him, but to serve the cause. Sir, it appears from their own evidence, that Callender would have submitted to the court, but for their interference; that they volunteered on the occasion not for him, but for their cause; and yet the volunteers wanted the court to give them to another term to prepare themselves, and made Callender swear what they pleased to effect their purpose. They said they were not well acquainted with the law upon libels, and therefore wanted time to examine the subject; but surely when persons undertake to volunteer their services on any subject, they ought to be masters of it, and are entitled to no indulgence of delay. And as they declare they had formed the determination on the first instance of an indictment under the sedition law, to come forward to volunteer their services for the sake not of the man, but of their cause. Common decency to the court and a proper respect for themselves, ought to have dictated

to them in the interim to have made themselves fully acquainted with all the law relative to that subject in which they had thus determined officiously to interpose.

In the next place when the jury were about to be sworn, they challenged the array in order to set aside the whole panel. Such challenge can never be made correctly, but for the jury being returned by an officer not authorized, or for unfair and partial dealings in the officer who summons the jury. The reason assigned was, that one of the jurors who was returned had expressed sentiments, inimical to Callender. This, if true, might be a good cause to challenge the individual juror for favor, but no boy, who had read in an office six months would have supposed this a sufficient cause to have challenged the array, unless it had been further alleged that the marshal knew the juror had expressed such sentiments before he had summoned him, and had summoned him for that reason, which was not suggested. Is it possible to believe that legal characters of so great estimation, that one of them was then the attorney general of the State of Virginia, another almost immediately after appointed attorney general of the United States for the district of Virginia, and the third, appointed one of the chancellors of that state, should have been so utterly ignorant of the law relative to the challenge of the array, as to have made the motion they did? If not, it must be presumed their conduct was influenced by a wish to embarrass the court; to hold up the prosecution as oppressive; to excite public indignation against the court and the government, who endeavored to enforce it by attempting to impress a belief on the public mind that even their marshal had in the very beginning violated his duty to gratify the wishes of an oppressive government, and that for that purpose he had unfairly packed a jury! Was not this immediately, was it not designedly done for the purpose of exciting public indignation? What was the conduct of the same counsel when the court desired them to reduce to writing the questions they meant to propound to Col. Taylor? They have declared they hesitated whether they would do it; and before they did comply with the courts direction, they

made a direct effort to hold up to the bystanders that the court was acting with oppression and partiality to the prejudice of Callender, by imposing on his counsel difficulties and impositions which the court had not imposed upon the counsel for the prosecution! Whereas in fact the counsel for the prosecution had fairly stated the testimony he meant to offer, before he produced his witnesses, having no desire that the jury should be surprised with improper evidence—whereas the counsel for Callender wished to have witnesses examined to the jury without the least previous disclosure to the jury or court, of the evidence meant by them to be given; most evidently that they might have testimony illegal thus imposed upon them; and because they were, by the correct interposition of the court defeated in this object, they could not consent even to let this act of the court pass, without a direct attempt to impress upon the bystanders, that it was another instance of the unfair and oppressive conduct of the court, which ought to excite their indignation! And here let this honorable court remember that Callender in his Prospect Before Us, had in the most solemn manner appealed to the State of Virginia, that if ever the time should come when the government of the United States should attempt to prosecute him and make him a victim under the sedition law, that state was bound under every principle of interest, of justice, and of the claims he had upon them, to come forward, and at all risks and by all means to protect him. Is there not, sir, great reason to believe, that the object of counsel was to second this appeal so made by Callender, and to induce the people of Virginia to come forward to save their client from the pretended oppression of government—to rescue him from their fangs!

One of the gentlemen who was the counsel of Callender, has told us that whenever a prosecution should be attempted under the sedition law, he had formed the determination to come forward to prove its unconstitutionality. That in consequence of this determination in Callender's case, and only for that purpose, he did appear in order to argue its unconstitutionality. He has told us further, that he had no hopes

of convincing the court, and scarcely the faintest expectation of inducing the jury to believe, that the sedition law was unconstitutional; but yet that he wished to argue the question, with a view of making a proper impression upon the public mind? and yet he has disclosed to us upon his oath, that when the court had charged him with wishing to address himself to the populace and not to the court he denied the charge, and told the court he only wanted to address himself to and to be heard by the court, and did not wish to be heard by the jury and by the bystanders! When at the same time he knew he could not be heard by the court without also being heard by the jury and the bystanders, unless they had all been, a thing unknown, sent out of the courthouse; or what is equally unknown, had their ears stuffed with cotton, or filled with wax; and yet the same gentleman has said on oath, notwithstanding that declaration that it was his chief, almost his sole object upon that subject to be heard by the bystanders, and on them to make proper impressions! What barefaced, what unequalled hypocrisy does he admit he practiced on that occasion! What egregious trifling with the court! But, I would ask this honorable court, what were the impressions which Mr. Hay was so solicitous to make on the people? Was it merely to convince them that the sedition law was unconstitutional, and ought not to be enforced? Had not the legislature of his state some time before announced this law as unconstitutional, and destructive to liberty? Had they not circulated the denunciation throughout every part of their own state, and sent it to every legislature in the union. Do not let me here be understood to censure that honorable body, or to question the propriety of their conduct, or the rectitude of their motives; far be it from me to doubt that they honestly believed the law to be unconstitutional and fraught with all the evils which they suggested would flow from its execution; and therefore that they thought it a sacred duty to act as they did. I am not in the habit of questioning the motives which influence public or private bodies; it is my duty to leave that question to their own consciences and to their God; I

myself view them in the most favorable light. I only mean to state as a fact, a transaction of notoriety; but can it possibly be supposed after this, the people of Virginia wanted a speech from Mr. Hay to induce them to consider the sedition law unconstitutional, or could he expect that those who doubted after being so well acquainted with the sentiments and conduct of their legislature, would be made converts by anything they should hear from him! No, sir; no person can think it. What then was his motive? Was it not to impress on the people, that, not only an unconstitutional, oppressive law, was about to be enforced; but also that the court, in order to enforce it, was acting in the most unfair and oppressive manner, as well as the marshal; and thereby to inflame the resentment and indignation of the populace against the court? I will not say that he really wished so far to have excited their violence against my honorable client as to have endangered his life; but it is impossible that I should doubt but that it would have given him pleasure, that their violence should have been so far at least excited, as to have intimidated the court from executing this obnoxious law.

When my honorable client went from Baltimore to Richmond to hold the circuit court, he knew how violently that state was opposed to the enforcement of this law; but he equally knew that it was his duty to carry it into execution, without regard to the sentiments of any portion of the community, or however disagreeable it might be to them. Under these circumstances he went to Richmond, and found the counsel from the first step in this cause, attempting, as he could not but consider it, to inflame the audience and excite their indignation against him. My honorable client, who well knows mankind, and has been accustomed to popular assemblies, appears to have been anxious, as his best security, to keep the bystanders in good humor and to amuse them at the expense of the very persons who were endeavoring to excite the irracibility of the audience against him. Hence the mirth, the humor, the facetiousness, by which his conduct was marked during the trial; and which, most fortu-



nately, was attended with the happy consequence he hoped from it, for it is admitted that he kept the bystanders in great good humor, and excited peals of laughter at the expense of the counsel, as the witness very justly concludes, for he says: "The counsel did not appear to join in the laugh." And this, sir, most satisfactorily accounts for the more than usual exertion of his facetious talents on the trial of Callender; and I doubt not was the real cause of that exertion.

Among the different charges made against Judge Chase of rudeness, and unusual language, by him used towards the counsel of Callender, we find it stated, that when the judge had repeatedly declared the counsel could not be permitted to argue to the jury the constitutionality of the law, and one of the counsel, who appears to have felt particularly sore on the occasion, still urging that question to the jury, the judge interrupted him and declared that the counsel of Callender had from the first mistaken the law, and that they had persisted in pressing their mistakes on the court. Never was there a more proper or correct expression used by a judge. Never, I believe, did the conduct of lawyers more fully justify such a charge! And, if the abilities of the counsel are as great as they are represented to be, it is almost impossible not to believe their errors were intentional, and with the express view to embarrass the court. In the first place, they insisted that the jury, not the court, was on the indictment of Callender to assess the fine, which should be imposed upon him; if found guilty. This was one of their errors, and a most egregious error it was. And yet my honorable client has been charged with rudeness for calling it as one witness states, "a wild notion." Or as Mr. Robinson has it in his short hand, "a mistaken notion." Either of these expressions was in my opinion extremely mild. I sir, should not have hesitated in calling it a mad notion.

The idea that the array was to be quashed because there was returned an individual juror, who was supposed to be liable to be challenged, was another mistake; a mistake that even a school boy in law could scarcely be expected to have

made. The affidavit so incorrectly drawn, and their insisting on a continuance of their cause in consequence of that incorrect affidavit was another mistake.

An additional mistake, was their idea that the court had no right to know what testimony they meant should be given by the witness produced, and that it was improper to require that the questions meant to be propounded to Col. Taylor, should be reduced to writing. And the attempt to obtain from the jury a decision that the sedition law was unconstitutional, in which they so pertinaciously persisted, was also an error. I ask then whether, when the counsel had been guilty of all these mistakes, it did not perfectly justify my honorable client in the expressions he used, that they had been from the first mistaken, and that they had continued throughout pressing their mistakes upon the court? Nay, did it not justify the observation used by him, which has been urged as most exceptionable, "that they must know better; and that their conduct was intended to influence the bystanders." That the counsel's great object was to give an impression to the people has been acknowledged on oath; and the court must have had a very moderate idea indeed of the legal abilities of Callender's counsel if they could have supposed such a succession of errors to have arisen from ignorance.

But the judge is also charged with great rudeness in the manner in which he replied in one part of the argument to Mr. Wirt, just at a time when that gentleman had finished a syllogism; by replying that it was a *non sequitur*. I will state the transaction. Mr. Wirt having, as he supposed, established the position that the jury had a right to decide the law as well as the fact, he proceeded to state that the constitution was the supreme law of the land, and therefore that since the jury had a right to decide the law, and the constitution was also the law, the jury must certainly have a right to decide the constitutionality of a law made under it; and this conclusion was as he declared, perfectly syllogistic. As Mr. Wirt had assumed the character of a logician in his argument, nothing could be more natural than for the judge

in his answer to assume the same character. He therefore replied, like a logician, "*a non sequitur*, sir;" the correct answer to a syllogism, which is rather lame in its conclusion. But it seems this answer was accompanied by a certain bow. As bows, sir, according to the manner they are made, may like words, according to the manner they are uttered, convey very different meanings; and as it is as difficult to determine the merit or demerit of a bow without having seen it, as it is the expression of words without having heard them. To discover, therefore, whether there was anything rude or improper in this bow, I could have wished that the witness who complained so much of its effect, had given us a facsimile of it. Had we been favored not only with the answer, but also with a complete facsimile of the bow, we might have been better enabled to have judged of the propriety of my honorable clients conduct in this instance. But it seems this bow, together with the "*non sequitur*," entirely discomfited poor Mr. Wirt, and down he sat "and never word spake more!" If so, it was a saving of time. But we have no proof that Mr. Wirt meant to have proceeded any further in the argument, even had he not been encountered with this formidable bow and *non sequitur*. And the presumption is, that having condensed the whole force of his argument into a syllogistic form, and finding his syllogism did not produce the conviction intended, he took his seat without wishing to spend more of his breath in what, after the failure of his logical talents, he no doubt considered a fruitless attempt. Mr. Nicholas followed Mr. Wirt, he is a gentleman mild and polite in his manners, he was treated by the court with politeness. He did not persist in addressing the jury contrary to the decisions of the court, he therefore met with no interruptions.

We have now more particularly to discuss the charge made against Judge Chase as they relate to Mr. Hay, the other counsel for Callender. Mr. Hay insisted that the indictment could not be supported, because the title of Callender's publication, parts of which were charged to be libellous, was not inserted in the indictment to-wit. because it was not stated in the indictment that the book, which contained the libellous

matter, was called "The Prospect Before Us." And to support this objection he went on to prove, that when an indictment states libellous writings in tenor following, the libellous part of the writing set forth, and on which the indictment is found, must be set forth "*verbatim et literatim!*" There was no attempt to show that any expression in the indictment was not stated correctly both verbally and literally, as published by Callender. The indictment did not charge the title of the book as being libellous. It did not notice the title of the book in any manner. If the title of the book was necessary to have been inserted, which I deny, there could not have been a more absurd or inconclusive argument to support the position, than that upon which Mr. Hay relied; and the judge showed great temper in merely exposing it to ridicule in the manner he did, by observing that as he insisted the libellous matter should be set out *verbatim et literatim*, he wondered he had not also insisted it should be set forth *punctuatim*. An observation by the by, which perhaps contained full as much of good sense as of smartness, since we all know the same words written or printed, will be liable to different constructions, and convey very different meanings, as they are punctuated. Mr. Hay, it appears from his own testimony, as well as the testimony of the other witnesses, was guilty of very improper conduct to the court. He insisted that if the prisoner was convicted upon that indictment, he might again be indicted for the same offense, and could not defend himself by the conviction on the indictment then before the court. When the court assured him he was mistaken in the law, Mr. Hay still persisted and declared, that he should not be more surprised, even if Mr. Callender should again be indicted for the same offense, and should be punished a second time for the same offense, than he was surprised at the indictment then before the court, and the attempt to punish Callender in consequence of that indictment. What language, I pray you, could be used to the court, but in reality addressed to the populace, more derogatory to the then administration, as being unprincipally oppressive, or containing a more direct attack upon the integrity of the

judges, holding them up as the venal tools of the then administration, ready to be the instruments of its oppression!

What was also the final conduct of Mr. Hay, when having repeatedly attempted to argue to the jury against the direction of the court, and having as repeatedly been interrupted and stopped by the court? He took up his papers to withdraw; upon which the court told him, if he pleased he might proceed. His answer was, "I will not." When the court further observed, you will not, Mr. Hay, be captious, go on if you please in any manner you choose, and we will not interrupt you. Even then, when in my opinion, the court had, as in Fries' case, made improper concessions, what was his answer? "I am not captious, but I will not proceed." And he folded up his papers and withdrew.

How came he thus to act? As to Callender, he acknowledges he despised the wretch, that his object was to serve the cause, not Callender. How was he to serve the cause? By giving an impression to the public mind. What impression did he wish to give? By holding up the idea of oppression on the part of the government, and corruption on the part of the court. But finding himself thus foiled in his attempt, by the superior abilities of my honorable client and his superior knowledge of mankind; finding that, instead of exciting indignation against my client, my client most fortunately had excited against him the laughter and ridicule of the auditors, he went out in a passion. At the same time, even the manner in which he left the court, showed his wish to impress the public mind, as far as possible, with sentiments disadvantageous to the court. And as to the interruptions Mr. Hay received, they are clearly proved to be in consequence of his pertinaciously attempting to act contrary to the direction of the court, and in that case the only question could be, whether the court or Mr. Hay had the control over the other.

But sir, there is another charge which has been made against my honorable client to justify that part of the article which accuses him of rudeness. It is said that speaking of Callender's counsel, or addressing himself to them, he called

them "young gentlemen." To me it appears astonishing, that these expressions if used by the judge, should be thought reproachful to the counsel, or a proper subject of a criminal charge; and it gave me real pleasure to find that Mr. Nicholas, whose whole conduct marks him as a gentleman, did not consider them offensive. He has observed that he was young at the time, and whoever has seen him as a witness, must be convinced of the truth of his assertion. But we are told that Mr. Wirt was at that time about thirty years of age, had been a married man; and was then a widower. It does not appear that Judge Chase knew of these circumstances; but if he had, considering that Mr. Wirt was a widower, he certainly erred on the right side, if it was an error, in calling him a young gentleman. But, sir, let it be considered that my honorable client has been stated by the honorable managers to be nearly three score and ten, let also his great legal attainments be considered and let me ask, if any person can think his addressing gentlemen so much inferior to himself in age and knowledge by the epithet of "young gentlemen," offensive to them, much less criminal as to the public? But as another instance of his rudeness we are told, that addressing himself to Mr. Wirt, who observed that "he was going on," the judge replied "no, sir; I am going on, therefore sit down, sir." This address was made by the judge to Mr. Wirt, when he (the judge) was about to give a long opinion to him and the counsel employed with him, which opinion, upon Mr. Wirt's sitting down, the court did give. And pray, sir, was there the least impropriety in a situation of that nature that the court should desire the counsel to be silent and to take their seats.

Before Judge Chase went from Baltimore to hold the circuit court at Richmond, he knew that the sedition law had been violated in Virginia. I had myself put into his hands "The Prospect Before Us." He felt it his duty to enforce the laws of his country. What, sir, is a judge in one part of the United States to permit the breach of our laws to go unpunished, because they are there unpopular, and in another part to carry them into execution because there they

may be thought wise and salutary? And would you really wish your judges, instead of acting from principle, to court only the applause of their auditors? Would you wish them to be what Sir Michael Foster has so correctly stated, the most contemptible of all characters, popular judges. Judges who look forward in all their decisions, not for the applause of the wise and good; of their own consciences; of their God; but of the rabble of any prevailing party? I flatter myself that this honorable senate will never, by their decision, sanction such principles! Our government is not, as we say, tyrannical, nor acting on whim or caprice. We boast of it as being a government of laws. But how can it be such unless the laws, while they exist, are sacredly and impartially, without regard to popularity, carried into execution? What, sir, shall judges discriminate? Shall they be permitted to say, "this law I will execute, and that I will not; because in the one case I may be benefited; in the other I might make myself enemies?" And would you really wish to live under a government where your laws were thus administered? Would you really wish for such unprincipled, such time serving judges? No, sir, you would not. You will with me say, "Give me the judge who will firmly, boldly, nay, even sternly, perform his duty, equally uninfluenced, equally unintimidated by the "*Instantis vultus tyranni*," or the "*ardor civium prava jubentium*!" Such are the judges we ought to have; such I hope we have and shall have. Our property, our liberty, our lives, can only be protected and secured by such judges. With this honorable court it remains whether we shall have such judges.

The remaining part of this charge states that my honorable client "betrayed an indecent solicitude for the conviction of the accused, unbecoming even a public prosecutor and as highly disgraceful to the character of a judge, as it was subversive of justice!" I am not certain, sir, whether I exactly know what is here meant by a public prosecutor. If thereby is meant the public officer, who prosecutes those charged with being guilty of crimes against the public, I am indeed sorry to find that those officers, so necessary, are

holden by the house of representatives of the United States in so incorrect a point of view. I deny, sir, the propriety of the remark; and must be permitted to rescue the public prosecutor from a remark so derogatory. He is as much the protector of innocence, as the avenger of guilt; his duties are as clearly marked as those of a judge. They have both one common object in view, though acting in different characters. The prosecutor and the judge are equally bound to shield the innocent and to punish the guilty. The prosecutor does the same benefit to his country by saving the innocent from punishment as by preventing the guilty from impunity. Neither the judge nor the prosecutor ought to attempt injuring innocence. It is equally the duty of both to punish guilt! Such, sir, are my ideas. Such, sir, I have ever understood the duties of an office, which I have held in the state of Maryland, for twenty-seven years or more; and if my conduct had not been during that period, consonant to these sentiments, I should indeed feel myself degraded and dishonored.

I have now Mr. President gone through the observations, which have appeared to me necessary upon the four first articles. If I have been thought tedious my apology is the respect I feel for the dignified source from which these charges have proceeded; from my inability to decide, which of the charges the honorable managers will most rely upon, in their conclusion; and the consequent necessity of dilating upon them all; sensible of the extreme danger, that for want of exertions which indeed require greater abilities than I am able to bring into action, erroneous impressions should remain in any instance upon the minds of this honorable court, in a case of such public magnitude, and in which my honorable client is so deeply interested. For his sake, for the sake of my country, I have felt it a sacred duty to exert those few talents which providence hath been pleased to bestow upon me!

*February 25.*

*Mr. Martin:* After having returned my very sincere thanks to this honorable court for their polite attention on



Saturday, in giving me time to this morning, I will now proceed to the further investigation of the case, in which we are engaged. But before I call your attention to the fifth and sixth articles of impeachment, permit me to notice some few points that I find had been unattended to by me on Saturday.

When a witness (Mr. Rind) who had been in some degree concerned in printing "The Prospect Before Us," appeared at the trial of Callender to give evidence against him, we are told Judge Chase assured him that he might be under no apprehension from giving testimony, for that he should not be prosecuted on account of any thing he should disclose on that trial.

What is the fact from the evidence? Mr. Rind, it seems, was summoned as a witness, he came forward without any objection on his part, to give evidence. It was then that Mr. Hay, in order to throw impediments in the way of the prosecution, undertook to interfere with the witness of the United States, and to tell him that he was not obliged to give testimony, as it might criminate himself. The judge replied it was very true, but that the court would take care the witness should not be prosecuted on account of any thing he should disclose in his evidence, which might affect himself. By this the court only meant that they would not institute any criminal prosecution against the witness, and if any indictment should be found against him grounded on the testimony thus given by him, they would interfere with government to procure a *noli prosequi*, or pardon and on these conditions and under such promises it is a most usual practice to introduce associates and accomplices to give evidence for the conviction of other and greater criminals. But this is suggested to have been improper in the judge; and one of the witnesses, the present attorney general of Virginia, has on his examination rather hazarded the idea, that any interference of the nature in question ought to have been by the United States attorney for that district and not by the court.

The gentleman is mistaken. In Great Britain, when an

accomplice is produced to be a witness, his production and the security he hath against prosecution on account of any thing which he may disclose having a tendency to criminate himself, is the act of the court and not of the public prosecutor, except so far as it is done under the direction and with the courts approbation; to support this position I will again turn to M'Nally, p. 203.

"The admitting an accomplice as a witness for the crown is not a matter granted by the court as of course, but depends upon the question whether the indictment can be found and supported without his evidence. King against Robert and William Luckhurst, Maidstone, Lent assizes, 1798."

This authority clearly shows that in England it is considered the province of the court to decide when and on what terms accomplices shall be introduced as witnesses; and such has been the uniform practice in Maryland.

And here let me observe before I quit this subject, as to Mr. Hay's conduct, that although this witness came forward voluntarily to give testimony without making any objection on his part, Mr. Hay to obstruct the prosecution, officiously interfered as far as he could to deprive the United States of the testimony necessary to convict the offender and to dissuade the witness from being sworn. A conduct I confess I cannot but view as being at least highly censurable, yet, sir, my honorable client suffered it to pass without even the smallest reprimand! This did not show a disposition on the part of Judge Chase to be captious even with Mr. Hay.

There was another part of the testimony I omitted to notice; I will now do it, lest the gentleman, who comes after me might make the same omission. It has been suggested by two of the witnesses, that the court in one instance used the word "we," in the plural number as identifying the court with the prosecutor of the United States. Mr. Hay has stated it to have been on the following occasion; when the counsel for Callender reproached the court with being guilty of partiality in requiring the questions by them pro-

pounded to Col. Taylor to be reduced to writing although the court had not made a similar requisition of the prosecutor. The court in reply observed "the attorney when he opened his case, stated what he expected to prove. But though he did, we are not obliged to." He was asked if he was satisfied as to the correctness of these expressions, he replied in the affirmative, and being taken down as I have now introduced them and read to him, he adhered to them. Some mistake there must be, for the words so stated are destitute of sense or meaning. "But though he did we were not obliged to." To do what? I presume to have compelled him to give us his questions in writing.

The sense then must have been, that as the attorney had disclosed what he meant to prove, and as there was no doubt of the propriety of the evidence, therefore, they, the court, were not obliged to require of him to put his questions in writing. This construction reduces the answer to common sense and propriety, and frees the answer from obscurity and from censure. Mr. Nicholas thinks the word "we" was used in one instance by the court, as understood by him, in the same incorrect manner, as identifying the court with the attorney, but not at the time, or on the occasion to which Mr. Hay alludes; he, however, is incapable to specify at what time or on what occasion. I ask, sir, upon such evidence so uncertain, so vague, so unsupported, can any criminality be fixed as to this part of the charge upon my honorable client.

Indulge me, sir, with a few remarks on certain private and social conversations which it seems have taken place between the judge and some others, and which though perfectly innocent of themselves, have been pressed into the service of this prosecution and attempted to be distorted into criminality and I will then quit this part of the charges. A very worthy and respectable gentleman, with whom I have long been acquainted (John T. Mason, Esq.), has been called upon to disclose a jocose conversation which took place between him and my honorable client a few days before he went on to Richmond to hold the court at which

Callender was tried. On that occasion he tells us Judge Chase informed him that he was going to hold the court at Richmond and that he was determined to teach the Virginia bar the difference between the liberty and the licentiousness of the press. That as to himself, there was no person a greater friend to its real liberty, nor a more decided enemy to its licentiousness. Judge Chase further observed that he was in possession of a copy of "The Prospect Before Us," which I had given to him and said either that if the state of Virginia was not totally debased or that if there was an honest jury to be found in that state, but Mr. Mason thinks the first, he would bring Callender to punishment. Mr. Mason has declared the conversation was open and public in the presence of a number of gentlemen, perfectly jocular, and in a great good humor and it is proved the conversation was introduced by Mr. Mason himself, whose facetious talents are so well known. That gentleman has declared that it was painful to him to be obliged now to disclose what then passed. Nor can any person doubt it; or that nothing but a sense of the obligation he owes to his country when thus called upon to obey the claims society has upon him, could have induced him thus to disclose the particulars of this sportive facetious conversation introduced by himself, to gratify the views of any person, who would wish to turn it to the disadvantage of my honorable client.

But, sir, I will ask in all this what is there which fixes any criminality on Judge Chase, or which indicated on his part a disposition to oppress? It was a fact notoriously known that the bar of Virginia in general did or at least professed to, consider the sedition law unconstitutional, as unduly restraining the liberty of the press—that great Palladium of our rights. On the contrary, my honorable client with many other respectable characters, legal and others, considered it as a wholesome and necessary restraint upon its licentiousness and believed that such restraint was the best security for the preservation of its liberty. And on this subject let me introduce the authority of Dr.

Franklin, himself a printer, and as great an advocate for the liberty of the press as any reasonable man ought to be. He has declared that unless the slander and calumny of the press is restrained by some other law, it will be restrained by club law. The sentiment sir, is just. If gentlemen cannot find in the laws of their country a protection from that profligate conduct of printers, which is at this time so common, or cannot obtain from the laws of their governments ample punishment against their base calumniators, they will become their own avengers. And to the bludgeon, the sword or the pistol they will resort for that purpose. But to return to my client, it was his knowledge of the prevailing ideas of the Virginia bar that induced him to use expressions which amounted to no more than his strong sense, that they had erroneous opinions as to what was the true liberty of the press and did not properly distinguish between its liberty and its licentiousness.

And as to the determination, he expressed that he would bring Callender to punishment. Mr. Mason has declared that every thing the judge said on that subject was predicated upon the supposition, that Callender was in reality the author of "The Prospect Before Us."

There was nothing then personal as to Callender, but only an honest indignation expressed against a vile libeller whomever he might be.

The judge had in his hands one of the most flagitious libels ever published in America—a case in which there had been the most impudent and daring violation of a law of the United States; he considered it his duty to put the law in force against such an offender. And was it not? Yes, sir, if a judge either of his own knowledge or by information derived from a respectable source has reason to believe the laws of his country have been violated particularly in cases of magnitude, it is his sacred duty to recommend to the grand jury an examination into such crime, and to endeavor to bring their perpetrators to due punishment. I, sir, disclaim the idea that a judge shows a want of impartiality because he is desirous to see guilt punished.

I, sir, have no idea that our judges should be like the gods of Epicurus, lolling upon their beds of down, equally careless whether the laws of their country are obeyed or violated, instead of actively discharging their duties. Judge Chase went to Richmond determined to enforce the laws of his country; it was an honest determination! He might, it is certain, under the frivolous pretexts used for that purpose, have continued the cause to another term, he might by so doing have left the odium of enforcing this obnoxious law to be incurred by some other of the judges; by so doing my honorable client might have avoided the obloquy to which he has been exposed on account of this trial, and this impeachment as far as it is founded thereon. But had he so done, in my opinion he would have been guilty of a cowardly dereliction of his duty.

Mr. Triplett has also been introduced to prove casual conversation in the moments of unsuspecting sociality and levity. He it seems traveled in the public stage with Judge Chase to Richmond. On the second day of their journey, having formed an acquaintance during that time, some conversation being introduced relative to Callender, Mr. Triplett informed the judge that Callender had, when he first came to Virginia been taken up in Berkley County as a vagrant and Judge Chase replied "it is a pity that they had not hung the rascal." And this is introduced to prove that the judge left Baltimore with a predetermination to oppress and do injustice to Callender!

I have, sir, heard, I believe more than one hundred of the most respectable gentlemen of all political parties use similar expressions, not only when speaking of Callender, but also of some other printers. But these expressions I only considered as marking their disapprobation of the conduct of those printers, not as a proof they would be guilty of injustice towards them, or that they would do them any unauthorized injury. Triplett had in the stage informed my client that he had never seen Callender, the judge meeting him at the door of the tavern, where they both lodged, as he came from court the day on

which the bench warrant issued, observed to Triplett, "that the marshal had gone after Callender, therefore that he probably would have the pleasure of seeing him," and a day or two after informed Triplett that the marshal had returned without Callender, and he was afraid they should not catch the damned rascal that court. Triplett has told us he boarded with Judge Chase at the same tavern six days; they were traveling together three days, during this whole time of nine days, such only are the scraps of loose idle conversation, which have been picked up and brought forward as indicating a hostile and oppressive principle towards Callender.

As to the word "damned," which has been introduced in the conversation, however it may sound elsewhere in the United States, I cannot apprehend it will be considered very offensive, even from the mouth of a judge, on this side of the Susquehanna; to the southward of that river it is in familiar use, generally introduced as a word of comparison, supplying frequently the place of the word "very" not confined to cases where we mean to convey censure, but frequently connected with subjects most pleasing; thus we say indiscriminately a very good or a damn'd good bottle of wine—a damn'd good dinner, or a damn'd clever fellow.

But, sir, what must at once efface every pretense of a disposition hostile and oppressive towards Callender on the part of Judge Chase, is the mildness of the punishment inflicted.

I now, Mr. President, shall proceed to the fifth and sixth articles of impeachment. These relate to the process issued against Callender, and to the time at which it was made returnable. By the fifth article my client is charged with having "awarded a *capias* against Callender by which he was arrested and committed to close custody.

The criminality alleged against my honorable client by this article as well as the sixth, consists in his violation of a law of the state of Virginia, by which it is supposed his conduct ought to have been regulated.

We find from the evidence in this cause, that the legal

characters of that state, whether on the bench or at the bar, cannot agree among themselves as to what is the law of that state, and that the practice has been and continues to be variant in various counties in Virginia. Nay, it is proved that two highly respectable legal characters, who successively held the office of attorney general (Col. Jones and Gen. Brooke) were applied to by one of their deputies and declared themselves incapable to decide what ought to be the practice, or in other words, to decide in which cases a summons ought to be issued and in what cases a capias was the proper process. Surely then Judge Chase, who was a stranger in Virginia, cannot be considered criminal nor even subject to reproach for not understanding a law of that state, the true construction of which remains even now a question, upon which the Virginia judges and lawyers find it impossible to agree.

Upon these observations I think I might safely rest my client's defense, as to this charge; and even consent that he shall be convicted and removed from office, whenever they shall agree among themselves upon the construction of their law, provided it should be against us.

But, sir, I must request to be indulged in an endeavor to investigate this subject which appears so intricate, and to try if I cannot throw such lights upon it as possibly may be serviceable to the gentlemen of the bar of that state, whose law is in question; and in this attempt I feel a confidence, that I shall be at least able to satisfy this honorable court, Judge Chase, even if bound to conduct himself according to the laws of Virginia, which I utterly deny, and shall endeavor to disprove, acted not only free from criminality, but with the strictest propriety.

The sixth article alleges that by the laws of Virginia it is provided, that in cases not capital the offender shall not be held to answer any presentment of a grand jury until the court next succeeding that during which such presentment shall be made, and yet that my honorable client with intent to oppress and procure the conviction of Callender, did at the said court at which he was presented, rule and adjudge



him to trial, during the term at which he, Callender, was presented and indicted.

In answer to this charge, sir, permit me to state there is no law of Virginia that declares the offender presented for an offense not capital, shall not be tried until the succeeding term; it is only an inference, which that honorable body, who formed the articles of impeachment, have made from the supposition that in all such cases a summons only could be issued, returnable to the succeeding term, and in consequence that the offender could not be compelled to go to trial before the succeeding term.

But, sir, I have already shown that summons was not the proper process in Callender's case; that the laws of Virginia were not in the least degree operative on either the process to be issued, nor the time or the manner of its return, but that the one and the other was solely in the power of the court, vested in them by the laws of the United States, unrestrained by any law of the state of Virginia. Thus then the premises failing from which the inference was drawn, the inference of course must be rejected. Thus then the court being unrestrained by any law of Virginia or from any inference drawn therefrom, not only had a right to try Callender the same term he was indicted, but were bound in duty so to do, unless there was some good cause to justify the delay. When a presentment is made, there is such evidence that a crime has been committed, as to authorize the court, nay to make it their duty (as I have before observed) to issue process to arrest the criminal to prevent his escape from justice; our laws are not founded on the principle that the offender may have an opportunity to escape and elude justice; and hence it is that a grand jury is sworn to secrecy as to their deliberations, lest those offenders against whom enquiries are making, getting information of that fact may run off before they can be secured. And when the criminal is arrested and brought into court it is the duty of the court both as to the criminal and the public to have the cause decided as soon as can be consistent with justice.\*

\* Citing the Federal Statute before referred to.

Thus, sir, I flatter myself that I have upon the fifth and sixth articles shown that there was no law of Virginia by which the conduct of the judge was to be regulated, and that even if the laws of that state had been operative, they have not been according to their true construction in any degree violated.

But surely it can never be seriously contended that where a gentleman is appointed a judge of the United States, he is thereby expected to become perfectly acquainted with all the local laws, usages and decisions of every separate state in the Union—no such judge by any possibility can be had—however great the legal knowledge of any gentleman, it has been generally confined to the laws, to the practice—the judicial proceedings of his own state and to the common law as there used and introduced. From the perfect conviction of this truth, the district judge is appointed an inhabitant of the state which composes the district—he is supposed to know the particular laws, usages and decisions of his state. It is to him or the district attorney in his absence, the judge of the supreme court, when he goes to hold the circuit court, is expected to apply for information, as to what relates to these subjects, and thus we find Judge Chase correctly acting for the district judge being absent, when Callender was presented, we find my honorable client consulting with the district attorney, whose political principles certainly did not lead him to wish to oppress Callender, and also with the clerk of the district court, who is himself a gentleman of legal knowledge and a prosecutor in one of the state courts in Virginia, and it was under their advice and with their approbation that the process was issued, of the nature used and returnable in the manner we have seen. In fine, sir, it is impossible for the judges of the supreme court to have even a general knowledge of the particular state laws and practices, and if in consequence of that want of knowledge they were to be subject to impeachment, you would not be able to prevail upon any respectable character to accept the appointment. But I do not apprehend, sir, that the honorable managers place much reliance at this time on these two articles. Nor

do I believe the honorable house of representatives would have either adopted them or any of the articles, which have been brought forward against Judge Chase, had the same evidence been before them which hath been produced to this honorable court.

In saying this I do not mean in the slightest degree to censure that honorable body, they were acting as a grand inquest of the nation—they only had and only could have before them *ex parte* evidence. On the evidence which they had before them, I shall not suggest but what there was sufficient foundation for bringing forward the charges: But these charges have been patiently discussed, a mass of evidence hath been produced here, which they had not and after this full investigation, the honorable members who impeached him and who have regularly attended his trial, I doubt not are perfectly satisfied that he ought to be acquitted and will rejoice at that acquittal.

Before I conclude, let me add one other proof that the framers of the constitution never intended that juries should have any power to decide the law contrary to the instructions of the court, much less to decide on the constitutionality of a law. By the second section of the third article of the constitution of the United States it is provided, that in all cases to which the judicial power applies, except cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party, "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make."

Thus therefore it is in the power of Congress to authorize, in all such cases, an appeal to the Supreme Court even as to the fact from the verdict of a jury and empower the Supreme Court to control the jury if they appear to have erred. And such was the intention of the framers of the constitution.

They assumed as a principle, that the interests of the state governments and of the general government would often be at variance, that laws passed by the United States, the most wise and salutary, might be very obnoxious to and unpopular in some of the states—judges holding their commissions

under the respective states, that is the state judges, the framers of the constitution would not therefore intrust with the execution of the laws of the United States. They also considered that as far as juries were introduced, the jurors would be citizens of the respective states wherein the trials should be had—that they would in consequence probably partake of the interests, the prejudices and the passions prevailing in the state, and therefore might decide contrary to the direction of the judges appointed by the United States and thereby prevent the due execution of their laws. To obviate this, the constitution has a provision for an appeal to the Supreme Court even from the verdict of such a jury. Judge then whether the framers of the constitution ever contemplated giving power to counsel, to argue to jurors against the opinions of their judges or to juries to decide against such opinions!

I have now only to return to this honorable court my sincere thanks for the patient attention with which they have indulged me on this occasion, and to express to you, Mr. President, the high sense I have of the impartiality, politeness and dignity with which you have presided during this trial.

MR. HARPER FOR THE DEFENSE.

*Mr. Harper:* I proceed, Mr. President, to consider the various charges against our honorable client, in the order in which they have been placed by the prosecutors. It is not my design to go over the same ground which has been so recently trodden by my able colleagues. The task assigned to me is to range rapidly over the first six articles; to present some views on the subject which the multiplicity of the matter induced my learned colleagues to omit; and then to discuss at large the law and the facts under the seventh and eighth articles, which have not yet been touched.

On the case of John Fries, the subject of the first charge, permit me, Mr. President, to avail myself of a distinction, laid down by the honorable manager who opened the case, on the part of the prosecution (Mr. Randolph). That honorable

gentleman in his opening address made a distinction between a general maxim or principle of law, such as the definition of a crime; and a particular opinion on the law as applicable to a particular case. The former he admits to be proper in a judge, at any stage of a trial—the latter he denies to be so. He has chosen the definition of one offense to illustrate his position. I will take that of another. Suppose a man to be indicted and put on his trial for burglary. The crime of burglary consists in “breaking and entering a dwelling-house in the night time, with intent to commit felony.” This is the established definition of this offense. According to the distinction of the honorable gentleman, the judge might at the commencement of the trial, or at any stage of it, declare this general principle respecting the nature of the offense, even before counsel were heard. Nay, more, he would be justified in preventing counsel from attempting, before the jury, to controvert this principle. This latter point is not expressly admitted by the honorable gentleman; but it flows from his admission as a necessary consequence. So far the judge might safely go; but should he advance a step further and declare, before counsel had been heard, that the acts done by the person on trial did amount to burglary, then he would be culpable and even criminal; and this, the honorable gentleman contends, was done by the respondent in the case of Fries.

I consent to be judged by the rule which the honorable gentleman has himself established; and I undertake to show that nothing more was done by the respondent in the case of Fries than the honorable gentleman admits may be properly done by a judge; that he merely stated the general definition of the crime of treason, by levying war against the United States; but expressed no opinion whether the prisoner was guilty or innocent, whether the acts which he had done amounted to treason. For the correctness of this position I appeal to the opinion itself, as in evidence before the court.

In this paper the court, after some preliminary observations, to show that the question relative to the constitutional

definition of treason, were questions of law and not of fact, proceed to state as their opinion, "that any insurrection or rising of any body of people, within the United States, to effect by force or violence any object of a great public nature or of public and general (or national) concern, is a levying of war against the United States within the contemplation and construction of the constitution of the United States." "That on this general position any such insurrection or rising to resist or prevent by force or violence, the execution of any statute of the United States for collecting taxes, duties, imposts or excises, or for any other purpose (under any pretense, as that the statute was unjust, burdensome, oppressive or unconstitutional), is a levying war against the United States, within the constitution." "That military weapons, as guns and swords, mentioned in the indictment, are not necessary to make such insurrection or rising amount to levying war; because numbers may supply the want of military weapons and other instruments may effect the intended mischief." "That the legal guilt of levying war, may be incurred without the use of military weapons or military array." "That the assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason; although the judges or peace officers should be insulted or resisted, or even great outrage committed on the person and property of our citizens." "That the true criterion to determine whether acts committed are treason, or a less offense (as a riot), is the *quo animo* the people did assemble." "That if a body of people conspire and meditate an insurrection, to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war and the quantum of the force employed, neither lessens or increases the crime." "That a combination or conspiracy to levy war against the United States, is not treason, unless combined with an attempt to carry such combination or conspiracy into execution." And that "some actual force or violence must be used, in

pursuance of such design to levy war; but it is perfectly immaterial whether the force used is sufficient to effectuate the object."

This, no doubt, is a long definition. Perhaps it might have been expressed in much fewer words. But still it is a general definition of the crime of treason by levying war; without application of reference to any particular case, much less to the case of John Fries. It amounts merely to this: "That for any number of people, however small and inadequate, to rise with intent to resist or prevent by force, the execution of any general law of the United States, and to employ actual force for that purpose, amounts to levying war against the United States, although neither military weapons nor military array be used." This is the substance of the opinion. All the rest is merely illustration; and in this shape it is as much a general definition, as that of burglary.

How wide a field of defense do these definitions leave open! In the case of an indictment for burglary, would any counsel peevishly or insolently retire from the prisoner's defense, because the court might in the commencement of the trial, have stated this to be the legal definition of the crime? Would he insist on the absurd and mischievous privilege, of controverting so plain and well settled a principle of law? No. Far different would be his conduct. He would inquire whether any acts had been done, amounting in law to the breaking open of a house? Whether the prisoner was the perpetrator of those acts, or a party in them? Whether the house was broken open in the night time? Whether it was entered by the prisoner as well as broken? Whether it was a dwelling house? And whether it was broken and entered with intent to commit any crime amounting to felony? All these questions would be perfectly open, under the general definition which has been stated; and on the result of these inquiries, would the guilt or innocence of the prisoner depend.

So in the case of Fries, it was perfectly competent to his learned counsel, under the general definition of treason given by the court, to contend that the acts proved, did not amount to a rising of any number of people; that John Fries was not

implicated in those acts; that they were not done with intent to resist or prevent, by force or violence, the execution of any general law of the United States; or that no force or violence was actually employed, in pursuance of such intention. All these questions were perfectly open to them, notwithstanding the general definition of treason given by the court. Not one of these questions did the court in any manner decide. These questions involved the application of the general definition, to the particular case; an application in which the true proper and only defense of the prisoner consisted, and which the court neither made nor intended to make.

Surely these questions afforded full scope to the learned gentlemen, for the exertion of those argumentative powers, and the display of that legal learning, of which they have given, in the shape of testimony, so handsome a specimen at this bar. Even that eager fondness for legal disputation, which has carried them, on this occasion so far beyond the limits prescribed by the law of evidence, might have been gratified in this ample field. There was room enough for the learned and ingenious distinctions which one of the gentlemen (Mr. Dallas) has told us that he intended to make, between the case of Fries and that of the western insurgents. It was his intention, he says, had he not been prevented by this unfortunate definition, to dwell on several circumstances which, in his apprehension, distinguished the former of these cases from the latter. He tells us that his mind turned itself towards these distinctions, and was occupied upon them, from the moment when the court granted a new trial, after the first conviction of Fries. His mind was led into this course of reflection by the stress which he had observed the court to lay in the first trial of Fries, on the decisions in the case of the western insurgents. It would surely have been very unkind in the respondent, to prevent the learned gentleman from exhibiting the results of these long and profound reflections. But happily the respondent did not prevent him. His disappointment must be attributed solely to himself. The circumstances on which he informs us that he intended to rely, for distinguishing the case of Fries from those of the



western insurgents, were the martial array at Braddock's field; the march to Pittsburg, for the avowed purpose of attacking the garrison; and, I think, the attack on Nevill's house. The first of these circumstances applied to the nature of the assemblage, whether it amounted to a rising or insurrection; the second to the intent with which the rising was made; and the third to the degree and nature of the force or violence committed. They were all open to the learned gentleman under the opinion, which did not declare what sort of an assemblage would constitute an insurrection or rising; what circumstances would be sufficient evidence of the improper intent, or what kind or degree of force or violence must be employed; but merely stated that a rising or insurrection, proceeding from such an intent, and accompanied by actual force or violence, would amount to levying war. Whether the assemblage in Bucks and Northampton had the necessary ingredients, to constitute a rising or insurrection; whether the acts done afforded sufficient evidence, of an intent to resist or prevent by force or violence, the execution of the act of Congress; whether the force or violence committed were sufficient in nature or degree; and whether in all or any of these points of view, the case of Fries in Bucks and Northampton, was weaker than that of the western insurgents, or materially different from it; were questions not at all affected by the opinion, but left entirely open to the learned gentleman; who might, notwithstanding this opinion, have discussed them before the court and jury, at all the length into which the exuberance of his genius so much delights to shoot.

These learned gentlemen possessed, therefore, under the opinion communicated to them by the respondent, even if it had not been withdrawn, all the latitude which moderate counsel could have desired. All the questions of fact; all the questions of intention, which are questions of fact; the whole business of deciding, whether the case proved came within the general principle of law; of applying the general rule to the particular case; remained within the province of the jury, and furnished the only proper means of defense. Even

if the facts had been admitted, as the honorable managers contend, still the intent remained to be ascertained, and was a question of fact, solely cognizable by the jury. But it is utterly incorrect to say, that the facts were admitted. It was indeed, admitted, or rather it was not doubted, that certain acts had been done by John Fries and others. But whether those acts were of such a nature, and proceeded from such an intention, as to bring the case within the general rule of law, laid down by the court, was a point unsettled, which formed the proper and sole ground of inquiry. And this point was not affected by the opinion communicated by the respondent to the prisoner's counsel.

And here, Mr. President, let me be permitted to notice, what I deem a most dangerous error, respecting the constitutional power of juries in criminal cases. It is constantly asserted that the jury are to decide the law and the fact in criminal cases; and this is correct when properly explained; but taken in its literal and unqualified sense, it is contrary to every principle of law, and every dictate of common sense. It is the province of the court to expound and declare the law generally, in all cases, criminal as well as civil. To apply the law to each particular case, to decide whether the facts proved in any case, bring it within the general rule of law, is the province of the jury, and their only province. They have no dispensing power over the laws of the land. Will any man, the least acquainted with our system of jurisprudence, declare that a jury has a right to decide that breaking open and entering a dwelling house in the night time, with intent to steal, is not burglary, unless an actual theft be committed? I presume that no one will hazard such an opinion. The jury in such a case, may decide that the house was not broken open, and entered; that it was not a dwelling house; that the fact was not committed by the person accused; that it was not committed in the night time; or that it was not committed with an intent to commit a felony. But if they believe the affirmative, on all those points, they must find the prisoner guilty, or commit a direct violation of their oaths. They are bound by the general principle of law,

as declared by the court. Their duty, and their sole duty, consists in applying it to the particular case. In this sense, and this alone, are they judges of the law as well as fact.

It is well known that a new trial may be granted in a criminal case, where the verdict is against the party accused and is supposed by the court to be contrary to law. This proves that the jury are not the judges of the law, in the unqualified sense contended for by some persons. For if they were the judges of the law in that sense, it would necessarily follow that a new trial could no more be granted in favor of the prisoner in a criminal case, than against him. The rule that it cannot be granted against him, has been established by the court in favor of life, through a laudable motive of tenderness and humanity; and not because they had not power to grant new trials in this case as well as in others, where a verdict is contrary to law.

So in case of an offense created by statute, a jury may declare that the case proved on an indictment under the statute, does not come within it; for want of the improper intent, or of some other necessary ingredient. But it has never entered into the head of any man to suppose, that the jury, in such a case, has a right to declare that the statute itself is not a law of the land, has been repealed, has expired, or does not create any offense. All these are questions of law which come within the exclusive province of the court.

This consideration, by the way, furnishes the true answer to the famous Richmond syllogism, of which we have heard so much in this case; and proves the correctness of that decision, by which the counsel of Callender were prevented, most properly, from contesting, before the jury, the constitutionality of an act of Congress—a decision which the honorable managers have had the good sense not to call in question. This decision, undeniably correct as it is, and strange as the absurdities are to which a contrary principle would lead, can be defended on no other ground, than that for which I contend.

And I will ask how the case of treason can be distinguished in this respect, from that of burglary? If a jury be bound

by the general rule of law, which defines the crime of burglary; and be confined solely to the inquiry, whether the case proved comes within that rule; upon what principle can it be contended, that they are not equally bound by the general definition of treason?

Will it be contended that the latter definition is not as well settled as the former? This position I deny. How was the definition of burglary settled? It was not by any legislative act, remaining on record, or known by tradition; but by judicial determinations declaratory of the law. In the same manner has the definition of treason by levying war been settled. Three solemn adjudications in the same court, and one of them in the same case had declared it to be the law; and it was the law of the land, as much as the law defining burglary, or any other offense. If gentlemen deny that three solemn decisions upon the same point, by a court of the highest jurisdiction, are sufficient to settle the law; will they inform us how many decisions are necessary for that purpose? Or are we never to have fixed principles, or settled definitions of crimes? Is the law of treason never to be established on a certain basis? Are the nature and definition of this high offense to be left forever floating, on the uncertain and varying opinions of courts and of juries? Is that which was not treason today, to become treason tomorrow, according to the caprice, the interests or the prejudices of those who may be appointed to determine, or to the power influence or intrigues of the accuser or the accused? If succeeding courts and juries are not to be bound by precedents established by their predecessors, then will everything be treason when a man is tried by his foes, and nothing when he is tried by his friends. There will no longer be any security in times of party contention, for life, liberty or property; and we are destined to see acted over in this land, vainly boasting of its freedom and happiness, the scenes of judicial murder and pillage, which disgraced our mother country during the struggles between the houses of York and Lancaster. Sooner than live under such a system, I would take refuge in Turkey; where by bribing the Cadi, I might

escape from judicial tyranny; and might be safe from the oppression of the government, provided I avoided the offense of growing rich. Not for one moment would I live in a country where I should be tantalized with the semblance of liberty, and in fact liable to the penalties of treason, whenever I might by any act of opposition, or any assertion of my rights or those of my fellow-citizens, become obnoxious to a party in power. This must be the consequence, should the principles contended for by the managers finally prevail. When the rules of law defining offenses are fixed and certain, then is every man safe; because he may know the law, and may avoid offending against it. But if no respect is to be paid to former decisions; if counsel are to be allowed to controvert points, which have been solemnly and repeatedly adjudged; if our courts and jurors, without regard to former decisions, are to declare that to be law in each particular case, which the passions, the prejudices or the political views of the moment may dictate; then indeed have we grasped a shadow; while the substance has escaped from us, and the blood of our fathers has in vain bedewed their native soil. But no. So monstrous a principle cannot be endured, and will not receive the sanction of this honorable court. Rules of law once established must be adhered to. Courts must regard them as sacred, and must not allow them to be called in question. In this case the opinion communicated had been solemnly settled, and was a part and a most important part of the law of the land. There was no superior tribunal to review it; and if there be one the argument is still stronger. For then the acquiescence of the parties, who took no measures to get these decisions reversed, is added to the authority of the court which made them. The court, therefore, where the respondent presided, was bound to consider these decisions as the law of the land, to declare them as such, and to prevent them from being called into question, for the purpose of misleading the jury.

Another charge waged against our honorable client, under the first article of impeachment, is that he prevented the prisoner's counsel, in the case of Fries, from citing to the

jury certain English adjudications on the law of treason, and some statutes of the United States. So far as this charge relates to the statutes, I shall leave it most cheerfully where it has been placed, by my learned and ingenious colleague who commenced the defense. Nothing can be added to the striking and satisfactory view, which he has given of that point. As to the English authorities, I will make one observation, which did not fall within the scope of his argument.

The respondent did say that English adjudications, at common law, on the doctrine of treason ought not to be read to the jury; that English decisions before the revolution of 1688, under the statute of treasons, were deserving of very little attention; and ought to be received with great caution; and that such decisions since that revolution, though proper to be cited, were not to be considered as absolute authorities, but merely as strong arguments. Into the legal correctness of this opinion, it is not now my purpose to inquire. The point has been sufficiently discussed. But I beg this honorable court to remark that this opinion of which the learned counsel for Fries now so loudly complain, was an opinion precisely in their favor, and gave them all the advantage on this subject, that they expected to derive from citing these English cases. Why did they wish to cite these cases? It was, they tell us, to convince the jury of the very thing which the court thus declared to them; namely, that the English decisions before the revolution of 1688, were entitled to little or no attention; and that even those since the revolution, being in some degree founded on the former, ought to be received with caution, and not to be considered in the light of absolute and binding authorities. These were the points which they wished to establish by citing those English adjudications. And these were precisely the points which the court established. The decision was completely in their favor; and yet they complain of it as a grievous injury. They complain of it, though in their favor, because it was made without giving them an opportunity of speaking. Whence this causeless discontent, this most unreasonable complaint? Did

it proceed from the disappointment of a puerile and little vanity, which made them wish to exhibit their talents before the public? Surely we cannot suspect those learned gentlemen of so contemptible a motive. Why then, I repeat, do they complain of a decision made in their favor? They have been compelled by the force of truth, to explain the reason. The truth is, as it appears on their own testimony, that they complained, not because they thought themselves or their client injured by this decision, but because it suited their purpose to represent themselves as injured, their client as oppressed, the case as prejudiced, and the conduct of the court as arbitrary and precipitate; in order to excite odium and resentment against the court, and commiseration towards their client; and to induce the President, by erroneous impression thus made on his mind, to extend his mercy to a person who could not have been thought a fit object for it, had the truth been known. The whole of this pretended displeasure; all this affected outcry about the privileges of counsel, the rights of jurors, and pre-judged opinions; was a mere pretense, an artful contrivance, to procure the pardon of a criminal twice convicted of treason; and to procure it by holding up a falsehood to the view of the President, and of the public; by calumniating the court, deceiving the executive, weakening the confidence of the people in the administration of the laws, and sacrificing truth and justice to the attainment of a momentary purpose.

The learned gentlemen thought themselves justified in all this, by their duty to their client. It is not for me to condemn them. I am not here to examine into the impropriety of their conduct. But I may be permitted to ask whether such a contrivance ought to receive the countenance of this high court? And whether gentlemen who have thought it right thus to act, ought not to be listened to with caution, when they come here after their finesse has completely succeeded, to complain of injuries, which in the same breath they tell us are entirely fictitious? I will ask, whether this honorable court ought not to discountenance such proceedings in future, by vindicating the conduct of the respondent,

in this particular? Counsel, Mr. President, have duties to themselves and to the public as well as to their clients. They are at all times bound to respect the courts of justice and themselves. They owe to their clients every honorable exertion of their talents and industry, and the zealous use of every fair means of defense. In criminal cases, especially when life is in jeopardy, we expect more zeal, and are willing to allow more latitude. In favor of this zeal we are disposed to excuse some departure from the strict line which propriety would in other cases prescribe. But: to be countenanced, upheld and commended, for attempting to excite odium unjustly against a court; and to induce the President to believe that a prisoner was deprived by the court of a fair trial, when they knew the fact to be directly otherwise; is more than modest man would ask, or any man has a right to expect.

But let it be admitted for a moment, Mr. President, that on the first day of the trial of Fries, the respondent committed an error. I ask if it was not atoned for by his full and honorable retraction on the second? By the pains which he took to do away all the proceedings of the first day; to induce the prisoner's counsel to go on with the defense; and to secure to him in the utmost latitude, every advantage for making that defense? One of the honorable managers has told us, that the respondent's conduct on the first day, was an unpardonable sin. That repentance if it came at all, came too late. But this, sir, is not the rule by which we hope one day to be judged. We live in the comforting hope that repentance, if sincere, can never come too late. We hope that by a short, a death-bed repentance, we may obtain pardon for a life of errors and sins. Our holy religion permits us to believe that there is but one unpardonable sin; and that is hardness of heart, or refusal to repent. And shall we frail and sinful mortals, mete to each other a measure, which an all-just and all-powerful God does not mete to us? Shall we refuse to each other the effects of that repentance, by which alone we can ourselves hope for happiness hereafter? If for one error thus atoned for the respondent must be pun-



ished, let the first stone be cast by him, who has always retracted and corrected his errors, as soon as he was made sensible that they had been committed.

I do not, Mr. President, with my learned colleague who commenced the defense, disclaim the term "repentance" for my honorable client. Repentance is a term which suits creatures so frail and liable to error as men, even the best of men. We all have need of it, and I trust that we shall be ashamed of our errors, but not of our repentance. I have often had occasion to repent myself. I fear that I have not done it often enough. And however slight the errors which the respondent may have committed, I am willing in his behalf, to rely on the plea of repentance and amendment.

But this amendment we are told by the honorable managers was a mere pretense; a cloak beneath which the respondent sought to hide the supposed deformity of his conduct, when he found that it began to attract attention. But, I ask, was it a pretense to entreat, to supplicate the prisoner's counsel to proceed with the defense, till the cup of humiliation was drained to the dregs? Was it a cloak to be anxiously solicitous after the prisoner was abandoned by his counsel, to protect him from the dangers into which his ignorance of the law might betray him; to urge his acceptance of other counsel; to inform him carefully of his right of challenge; to assist him in cross-examining the witnesses, suggesting such questions as might be to his advantage, and guarding him against such as might draw forth unfavorable answers; to prevent the witnesses in the submitted cases, from being examined before his trial, lest the jury might hear testimony unfavorable to him, which he could have no opportunity of cross-examining? Was this the conduct of a designing hypocrite, seeking to gloss over his wicked purposes, by a fair outside of humanity and justice? Of an artful and worthless oppressor, thirsting for the blood of an innocent victim? If this be oppression, God grant that I and mine may never be otherwise oppressed!

I come now, Mr. President, to the case of Callender. But before I enter into those views which remain to be taken, of

the charges arising out of that case, let me be indulged in some preliminary remarks on that part of the evidence adduced in their support, which was supposed by the honorable managers to furnish direct proof of corrupt intentions on the part of the respondent.

This evidence was given by Mr. Mason, Mr. Triplett and Mr. John Heath. As to the first gentleman, his testimony relates to a private and jocular conversation, no part of which he recollects perfectly; and the most material part of which, the part that furnishes the true explanation of the whole affair, he has entirely forgotten. It cannot be doubted that this honorable gentleman was dragged with extreme reluctance to detail at the bar of a court of justice, a private and of course a confidential conversation, the most material parts of which a lapse of five years has effaced from his memory. It must have been to him a most painful necessity, a most cruel violence, which obliged him to do an act that, if done voluntarily, would have amounted to a violation of that confidence which in the intercourse of society men of honor place in each other. Ought a species of examination to be countenanced, which must place honorable men in so painful a situation, and subject them to so cruel a necessity? Which must compel them, after having been considered as companions, and perhaps as friends, to assume the odious character of spies, and to fulfill the detestable functions of informers? Which must destroy all the confidence, and of course all the pleasure of social intercourse, that great sweetener of the ills of life; must spread the gloom of mistrust over all our moments of hilarity and relaxation; and must convert our breakfast tables, our parlors and even our little friendly suppers, where the bosom is wont to expand, and the heart is laid on the table, into scenes of watchful jealousy, of dark and cautious silence! Ought a practice to be tolerated, which thus strikes at the root of social harmony, private honor, and public morality?

How dangerous, too, is this species of testimony to the interests of truth, and the safety of innocence! In this very case the honorable witness, with all his accuracy of recollec-

tion, and all his desire to represent the transaction, in a light as favorable to the party accused as the truth would permit, has forgotten the most material part of the conversation. That part in which he himself was immediately concerned, which drew forth the rest, and which furnishes the true explanation of the respondent's meaning. The part which he has thus forgotten, has been happily supplied by another witness, Judge Winchester, who was also present at the conversation. But what might have been the situation of the respondent, had Judge Winchester's memory been equally frail or had he died before this trial? That most satisfactory explanation which he has given, and which has removed every shadow of doubt from this part of the case, would then have been wanting; and the respondent might have been convicted on a recollection which would in that case have appeared complete, though we now know it to be utterly imperfect.

This explanation proves the whole conversation to have been a mere jest, and a jest provoked and drawn out by Mr. Mason himself. Without the explanation, it might have borne an improper, though not a criminal aspect. With the explanation it amounts to nothing more than an expression of the respondent's intention, made in jest, by way of reply to a jest of Mr. Mason, to have the affair of the "Prospect Before Us" investigated when he should arrive at Richmond and to bring the author and publisher to punishment. Will it be said that in this there is anything criminal, or even improper? Is it not the duty of a judge, presiding in a court of criminal jurisdiction, to cause inquiry to be made into offenses which he knows to have been committed, and to take steps for bringing the offenders to justice? Suppose that instead of a libel, a piracy had been committed; and that the respondent, being informed that the pirates were lurking within the district of Virginia, had declared that he would have them brought to trial if they could be caught, and punished if guilty—would this have been improper? And does the difference between offenses make any difference in the duties of a judge? Is he not equally bound to execute

all the laws? If gentlemen say no, will they be pleased to draw for us the proper line of discrimination between those laws which a judge must execute, and those which he ought to neglect? Or is this line to be drawn by his own caprice? Was not the sedition act a law of the land, and was not the "Prospect Before Us" a violation of that act? If there were any circumstances which rendered it proper to dispense with the penalties of this law, or to pardon the offenses committed against it, there was a power in the constitution to do so; but that power resided in the executive department, and not in the judicial; whose duty it was to execute all the laws, without respect to circumstances, persons or cases.

As to the testimony of Mr. Triplett, I cannot conceive what proof it can furnish of criminal intention. It amounts to this, and nothing more, that the respondent, in the course of some very loose and thoughtless conversation, from which it would have been much more prudent to abstain, applied some harsh epithets to the "Prospect Before Us," and its reputed author; and expressed an apprehension that he would escape punishment. But does it follow, that because a judge remarkable for hasty and strong expression, has applied some harsh and angry epithets, to a person believed to be an atrocious offender, he will not do him justice when he comes on trial? It must also be remarked, that Mr. Triplett is manifestly in a mistake, respecting the last conversation which he has attempted to detail. He represents the respondent as saying that the marshal had returned without Callender. But we know that the marshal did not return without Callender. This mistake on the part of Mr. Triplett may induce us to doubt, whether with the strongest desire to represent nothing but the truth, which I have no doubt that he felt, he may not have viewed the other circumstances also in too strong a light. We well know that facts of this nature derive their complexion, almost entirely from small circumstances of time, manner and connection; and when we find so candid a witness mistaken in so material a circumstance, we may fairly conclude that he has omitted on one hand, or too much heightened on the other, some of those

finer shades, on which the character of the piece always depends.

With respect to the fact related by John Heath, I have no difficulty in admitting that if true, it fixes the stain of corruption on the character and conduct of the respondent and ought to produce his conviction. Jurors in every case and especially in criminal cases, ought to be selected without respect to any circumstance, but their impartiality and legal qualifications. Of all criterions, that of political opinion or party connection is the most improper to govern, and ought the most carefully to be avoided. For a judge to interfere with the marshal, and direct him to strike off from a jury list in a criminal case, all those persons who were supposed to agree in political opinion with the party accused; or in other words, to combine with the marshal in packing a jury, for the purpose of insuring the conviction of the party accused, would be an offense for which he ought to be punished. But this testimony of John Heath is deeply shaken by one witness, and flatly contradicted by another. I will not inquire into the character of John Heath; which I have no means of knowing or of making known. But I will say that it cannot stand on higher ground than that of David Mead Randolph, who has flatly contradicted Heath; or of William Marshall, who has gone as near to a positive contradiction as it is possible to go without making one. There must be a mistake somewhere. But we cannot believe the fact stated by John Heath, without believing that David Mead Randolph has been guilty of a direct and wilfull perjury, and that William Marshall has gone as near to it as possible. Those gentlemen are known to all Virginia. The evidences of their character are to be found in the breasts of every man in that state. But as to Mr. Randolph, there is direct evidence in this cause to support his veracity. Mr. Hay has declared at this bar, that he did not recollect having used certain expressions which were attributed to him, but had no doubt that he had used them, after Mr. Randolph said so. Such was his reliance on Mr. Randolph's veracity and recollection! It is not possible to have stronger testi-

mony in favor of a witness. If stronger could exist, it would be found in another circumstance which has appeared in evidence. When one juror whom he had summoned for the trial of Callender told him that he had made up his mind to convict the traverser, and urged that circumstance as an excuse, the excuse was admitted by Mr. Randolph, and the juror was discharged. But when Colonel Harvie applied through the chief justice, to be excused in a similar situation; and alleged as a reason that he was pre-determined to acquit Callender, let the evidence against him be what it might, because he believed the sedition law under which he was indicted to be unconstitutional, Mr. Randolph would not excuse him. This fact appears by the testimony of the chief justice. Can it be for a moment believed, that a marshal acting in this manner, would enter into a corrupt and profligate combination with a judge to pack a jury for the conviction of Callender; and would come to this bar and complete his turpitude, by a direct and wilfull perjury? His conduct in office, the universal respect which he enjoys in his own country, among men of all parties and opinions; his manner of giving testimony at this bar; and the evidence which his political enemies have here borne in his favor, all preclude the idea.

This witness, so honorably supported by the principal witness on the part of the prosecution, so high in his character, so scrupulously delicate in his conduct, so ready to discharge a juror who had made up his mind to convict the traverser, while he refused to discharge one who was pre-determined to acquit him, is said by John Heath to have presented the panel of jurors to the respondent, who told him that if he had any "of those creatures called Democrats" on it, they must be immediately struck off. He positively declares that no such conversation as that stated by Heath ever took place; that the respondent never saw the panel; and that it was not completed till after the meeting of the court, when the respondent was on the bench, and, therefore, could not have been shown to him.

In this positive contradiction of Heath, he is strongly sup-

ported by William Marshall; the irresistible effect of whose testimony, derived from the peculiar candor, solemnity and precision with which it was delivered, as well as from his high character, all who heard it have felt and acknowledged.

Heath has declared that the incident which he relates, took place at the lodgings of the judge; that he was there but once, which was in the morning, a little before the time when the court usually met; that he remained about half an hour; and that no person was present, except the judge, the marshal and himself.

William Marshall declares that in the morning he called on the judge, according to his custom, a little before the meeting of the court; that when he entered the room, Heath had left it, or was in the act of leaving it, and immediately went away; and that the judge did not say one word in his hearing, which it was possible for Heath to hear. Thus far he speaks positively. He adds that he firmly believes, but cannot positively assert, that the marshal, David Mead Randolph, went with him to the judge's lodgings, and left them with him; and that they both together attended the judge to the courthouse. His reasons for this belief are, that he has a strong impression of the facts on his mind, though not a perfect recollection; that it was his daily custom to call on the judge in the morning on his way to the courthouse; that in going from his own house to the lodgings of the judge, he passed by or near the office of the marshal, who usually accompanied him, in order to attend the judge to court; and that he perfectly recollects a conversation between himself and the marshal on the way from the judge's lodgings to the courthouse in which he remarked to the marshal the circumstance of having seen Heath with the judge. This conversation with Mr. Randolph, Mr. Marshall perfectly recollects, and that it took place on the way from the judge's lodgings to the courthouse; and he very naturally infers from it, that they left the judge's lodgings at the same time. As the other circumstances which he has stated, induced him to believe with equal probability, that they went there together.

If they went together, then is Mr. Marshall also in positive

contradiction with Mr. Heath. The only way in which they can be reconciled, is to suppose that Mr. Randolph went there without Mr. Marshall, and had before that gentleman's arrival, the conversation which is related by Mr. Heath. It could not have been afterwards; for Heath went away as Marshall entered, and did not return. He has said that he was there but once; and that when he left the judge, he went immediately on the Hill, and related the conversation. That Randolph and Marshall went together is in the highest degree probable, not only from Marshall's belief of the fact, and the strong impression of it remaining on his mind; but also from the circumstances which he has stated. If they went together, then it is clear, if Marshall tells the truth, that Heath left the room as they entered it; that no conversation could have taken place between Randolph and the judge in the hearing of Heath, without being heard by Marshall also; and that none in fact did take place. Consequently it is manifest that unless we believe, contrary to all probability, and to the belief and strong impressions of Marshall himself, that Randolph went to the judge's lodgings before him, we must admit that his testimony, as well as that of Randolph is in direct contradiction with the testimony of Heath.

To this double contradiction we must add the extreme improbability of the fact itself. A judge having a design to pack a jury for the purpose of procuring the conviction of a person, whose supposed offense was intimately connected with the political struggle, in which the country was then so warmly engaged; about to execute this design at the place where the prosecution had excited the greatest irritation; surrounded on all sides, and watched at every moment by those whom he knew to have most zealously espoused the cause of the supposed offender; and entering into a corrupt combination with the marshal, for the purpose of carrying this criminal design into effect; a judge in these circumstances and with these views, develops his plans to a perfect stranger; whom, if he had known anything of him, he must have known to be perfectly devoted to the political friends and support-



ers of the person accused! Sir, the thing is impossible. The judge must have been a fool as well as a knave to act in this manner. Conspiracy, sir, seeks darkness, and not light. Its plots are formed in secret corners. Its communications are wrapped up in cyphers, or conveyed in cautious whispers. Had the respondent intended to hold such a conversation with the marshal, he would have waited till Heath was gone, would then have drawn his accomplice into one of those dark hiding places which conspirators love, and there would have muttered his corrupt orders. If the words which Heath relates had been spoken, the single circumstance that they were spoken openly in his presence would be sufficient to prove that they were nothing more than a foolish jest, devoid alike of criminal intent and serious meaning.

It is indeed possible that Heath may have heard the respondent utter some inconsiderate jest about democrats on the jury, which his zeal led him to mistake for a direction to the marshal to strike them off. I am desirous of supposing that something of this sort may have happened. For I can see no other way of relieving this man from the imputation of wilful false swearing, which it would be most painful to see fixed on any person, and especially on one who has filled an honorable station under the government of his country.

Before I quit the subject of Heath's testimony, let me be permitted, Mr. President, to ask why, if it was believed, it was not taken a year ago, when witnesses were convened from all parts of the continent and the testimony was collected on which these articles of impeachment were founded? It must have been well known at that time, for he has declared that he mentioned the fact to Hugh Holmes, Merewether Jones and some others, as soon as it happened, and to a great many persons afterwards. Had this testimony then been taken, and presented to the public with the rest of the evidence, we might have been prepared to contradict or explain it. I will ask, why the honorable managers have not summoned some of those persons to whom this story was related by Heath, and who might have corroborated or refuted his testimony? Those persons were fully within their reach. Nay, the minutes of

this court show that Mr. Hugh Holmes has actually been summoned. And, if I am rightly informed, he has attended for three days past. Why is he not produced? I will not undertake to account for this omission, but I will say, that if Heath's testimony was believed, it ought to have been taken at first, so as to give us an opportunity of investigating it fully; and that it appears probable that the managers would have adduced the witnesses who were certainly in their reach to corroborate Heath, did they not apprehend a contradiction instead of a corroboration.

So much for the proofs adduced, of a previous corrupt intention in the respondent to procure the conviction of Callender. Weak as they are in themselves, and broken by the opposing testimony, let us complete their overthrow by bringing against them the proofs which the evidence exhibits, of a disposition full of justice and humanity. It is written that "by their fruits ye shall know them." Let us then look to the fruits. Let us examine the conduct of the respondent towards Callender throughout the trial and inquire whether it bears the marks of a disposition to oppress.

And, first, let us oppose conversation to conversation. The conversation with William Marshall about the jury, to those with Mr. Mason and Mr. Triplett. William Marshall has informed us that the judge, having heard the name of Mr. Giles mentioned in court, inquired if that was the celebrated Mr. Giles, member of Congress; that he afterwards asked the witness whether it was probable that Mr. Giles would remain in Richmond, till the trial of Callender; and afterwards added that he should wish Mr. Giles to be on that jury; and indeed, if it were proper for him to give any intimation to the marshal respecting the jury, would request him to compose it entirely of persons who agreed with Callender in political opinions. What is to be inferred from this conversation? That he wished to convict Callender? No. But that as he knew the case to have excited strong party feelings, he wished the person accused to have a trial which would silence clamor, and preclude all suspicion of improper views; so that a conviction, should one take place, being free from the imputation

of party vengeance, might operate more strongly as an example to check the licentiousness of the press. Surely this motive was humane towards the party accused and highly patriotic as it respected the public.

When Callender was taken, the respondent, instead of committing him immediately to prison, as he might have done, there to wait till bail should be offered, manifested the utmost readiness to let him go out and search for bail and an anxious solicitude that he should find it. Instead of demanding bail in a large sum, one, two or three thousand dollars, for instance, which it was in his power to do, he demanded only what Callender himself declared he could give, and bail was actually taken in the very moderate sum of two hundred dollars.

After the counsel for Callender had been most properly overruled on legal grounds in their attempts to obtain a continuance; the respondent being obliged to refuse the continuance for which no sufficient ground was laid, humanely offered to postpone the trial for weeks and months for the accommodation of the traverser and his counsel. When this was refused, he postponed it from day to day, as long as they desired, to give the witnesses who were within reach an opportunity of coming in; and offered to issue attachments for those who did not appear, which would have induced necessarily a further delay.

And, lastly, when Callender was convicted, and thus placed completely within the power of the court, respondent instead of going to the utmost verge of the law in the severity of punishment, fined him only one-tenth of the sum, and imprisoned him for but little more than a third of the time which the law allowed. The sum limited by the law was two thousand dollars; and the fine imposed was two hundred. The term of imprisonment which the law allowed was two years; and the time fixed by the court was nine months.

Are these, Mr. President, the fruits of a disposition oppressive and corrupt? Again I say if this be oppression, God grant that I and mine may never be otherwise oppressed!

It is urged against the respondent under the second charge that he refused to let the indictment be read to the jury when it was requested by Callender's counsel. Why did they wish the indictment to be read? It was, they tell us, for the purpose of making known to John Basset and the other jurors, before they were sworn, the nature of the charges; and thereby enabling them to declare whether they stood indifferent, or had made up and expressed an opinion as to the matter in issue. But John Basset has informed us that when the question whether he had formed and expressed an opinion was put to him, he was perfectly apprised of the nature of the charges, and knew that Callender was indicted under the sedition law for printing and publishing "The Prospect Before Us." As to the other jurors, it is in evidence that before the question was propounded to them, the respondent explained to them fully the subject and object of the prosecution and the nature of the issues which they were called upon to try. Where then was the necessity, where would have been the use, of reading the indictment? It could have informed John Basset of that only which he knew before; and the other jurors of that which the respondent explained to them, much better than they could have understood it, by merely hearing a long indictment read in court. The object of the counsel, they say, and certainly the only proper object was to inform the jury. The judge took a shorter and much more effectual method of attaining this object. He clearly and fully stated to the jury the matter in issue, the points in dispute, and the legal principles which ought to govern their determination. He told them that Callender was indicted for printing or publishing certain libellous matter extracted from "The Prospect Before Us;" that he must be proved to be the author or publisher of that book; that the passages stated in the indictment must appear to be contained verbatim in the book, and to be false, scandalous and malicious; and that the book must appear to have been published; with intent to defame the president of the United States, and to bring him into disrepute and contempt. All this he fully explained to the jurors before the question was

propounded to them. Will any one say that all this could have been as clearly understood by the jury from simply hearing the indictment read? And is a judge to be censured because instead of consuming the time of the court, in reading a long indictment, he took a shorter and more effectual method of attaining the only proper object that could be attained by the reading?

As to the main point of the second charge, the overruling of Mr. Basset's supposed objection to serving on the jury, I leave the legal correctness of that decision, where it has been placed by the testimony of Mr. Basset himself, and by the very learned arguments of my two colleagues, who took up this part of the case. But admitting it for a moment to be incorrect, it is not impeachable, unless it proceeded from an improper motive. And what evidence of intention to oppress, or other improper motive, does it furnish? The respondent did not know, and had no means of knowing, the political opinions of Mr. Basset. And if he had known them, they could have furnished no reason for a particular wish to retain that gentleman on the jury. It would have been very easy to find another juror of the same opinions, who would have answered the purpose equally well. It is in evidence that the city of Richmond, where the court sat, and from whence a new juror must have been summoned, had Basset's been excused, abounded with persons of the same politics. Why then commit a crime, from which it was manifest that no advantage could be derived?

Stress has also been laid on the question propounded to the jurors in this case, "whether they had formed and delivered an opinion on the charges in the indictment?" But this question, it will be recollected, was the same which had been settled in the case of Fries, after much deliberation. This appears by the testimony of Mr. Rawle. If, therefore, it were an improper question, it would furnish no proof of improper intention against Callender; since it merely followed a precedent, which was established without the least reference to his case; a precedent, too, in which Judge Peters concurred. And although Judge Peters was, I presume, included in the

general charge of imbecility of character, adduced against the district judges, by the honorable manager who opened the prosecution, he has never been charged with deficiency in legal knowledge.

It has, moreover, been proved undeniably, by my two learned colleagues who discussed this charge, that this question, as propounded to the jurors in the case of Callender, was a great relaxation of the law in favor of the traverser. It was therefore an indulgence, instead of an act of oppression; and adds one more to the numerous proofs displayed by the respondent in this case, of a disposition full of humanity and kindness towards the party accused.

Under the third charge, which is founded on the rejection of Col. Taylor's testimony, it has been contended by the honorable managers, that the respondent rejected this testimony without knowing what it was. But this, sir, is an utter mistake. No part of Col. Taylor's testimony was rejected, except what related to the three questions stated by the counsel for Callender. From anything that appears we cannot conclude that any other testimony which Col. Taylor might have been able to give would have been rejected. It was not suggested that he could give any other, and there was no question about any other. Into the legal correctness of rejecting those questions, it is not necessary for me to inquire. That point I most cheerfully leave to be decided, on the very learned and conclusive arguments of my two colleagues. But I will request the indulgence of this honorable court, while I advert, as briefly as possible, to some of those considerations which show conclusively to my mind, that admitting the decision on this doubtful and difficult point of law to have been incorrect, it could not have proceeded from improper intention.

And here let me remark, that the respondent could not have been ignorant of Col. Taylor's high standing and character in the state of Virginia, of the influence attached to his name and his opinions, or the resentment which must in all probability be excited, by any act of oppression or impropriety, whereof he might in any degree be considered as the

object. The respondent could not be ignorant of the state of irritation, which then existed in that part of the Union, on the subject of the sedition law, nor of the extreme offense which must be given by any conduct of the court, having or capable of receiving the appearance of oppression under that law. He could not be ignorant that to reject Col. Taylor's testimony, was extremely capable of receiving that appearance and could hardly fail to assume it, in the state of personal and political feeling which then existed. He is admitted on all hands to be a man of sense; and would a man of sense, without some strong motive, commit deliberately a crime, so likely to blow up a flame of resentment against himself and those with whom he was connected?

What motive could the respondent have for rejecting, improperly, this testimony? To secure the conviction of Callender? No; for he was equally sure of that without the rejection. Col. Taylor's testimony applied to but one charge, and there were nineteen others undefended. If then he rejected this testimony, knowing it to be proper, he committed, without motive or object, the crime the most likely to heap odium on himself and to bring disgrace and ruin on the party with which he was connected.

Had he been actuated by a criminal intention to oppress Callender, it is far more probable that he would have received this testimony, believing it to be improper, than that he would have rejected it believing it to be proper. A judge capable of acting deliberately, under the influence of such a design, must be as regardless of the laws as of his oath. His considering the testimony as illegal, would not prevent him from receiving it, if receiving it could subserve his purpose better than in its rejection. In this case it would have served his purpose better. To reject gave him no additional hold on Callender; who was placed completely in his power by the nineteen undefended charges; but to receive it would throw a cloak of fairness and humanity over his conduct, under cover of which he might more safely and more fully glut his vengeance. The more he had saved appearances in this respect, the more safely

might he have indulged his vindictive temper afterwards.

But it is clearly proved by his requesting the district attorney to consent to this evidence, that he was actuated not by a wish to exclude it, but by a conscientious belief that it was illegal and inadmissible. This request may perhaps be represented, and I think already has been as a mere cloak; as an artful subterfuge to escape from the indignation which he saw rising. But how does this agree with the character of open and high-handed violence, which the honorable gentlemen attribute to the respondent? How does it agree with that incautious openness in his conversation, that indiscreet promptness in his conduct, almost amounting to precipitation, which appear throughout to enter essentially into this character? And had he been thus artificial, thus capable of throwing a hypocritical cloak of candor over his wickedness, must he not have perceived that his true policy consisted in receiving the testimony, without regard to its illegality?

If there could remain any doubt, as to the correctness of his motives in rejecting this testimony, it would be removed by his offer to submit the question to the judges of the Supreme Court, and to respite the sentence till their opinion could be known: the traverser, in the mean time remaining at large on bail. It is distinctly stated by Mr. Robertson and Mr. William Marshall, that this offer was made in reference to the decision of this point. We have had, indeed, some caviling about bills of exception in criminal cases. Perhaps the judge may have expressed himself inaccurately. He may have spoken of a bill of exceptions instead of a case stated; or he may have been misunderstood by the witnesses in this particular. But it is unquestionably proved, that in substance he offered to submit the question, whether this testimony was properly rejected or not, to the revision of all the judges of the Supreme Court; to let the sentence await the result of their deliberations; and to grant a new trial if they should think the decision erroneous. It is well known to every lawyer that although no writ of error or bill of exception lies in criminal cases,



yet it is the usual practice in England as well as in America, when any new and difficult point arises in a criminal trial, to state it for the consideration of a superior court, and to respite the judgment till the decision of that court can be had. The point, in such cases, is regularly argued by counsel before the superior court; to whose decision the judgment of the inferior court is made to conform. It is also known that a new trial may be granted in a criminal case, where there is a conviction, though not where there is an acquittal. What the respondent offered in this case, might therefore have been done, and he went further. He offered to assist Callender's counsel in doing it. He offered to them the assistance of his legal knowledge and experience, in framing the case to be stated on the record, for the consideration of the Supreme Court. This appears from the testimony of William Marshall. It is not for me to decide or to enquire, why those officers and all the others made by the respondent in this trial of Callender, were contemptuously rejected by his counsel. It is enough for me that the offers were made and that the conduct of my honorable client in making them, taken in connection with the other circumstances which have been noticed, proves beyond all possibility of doubt, that however erroneous in point of law his rejection of Colonel Taylor's testimony may have been, it proceeded from his honest judgment and not from a corrupt intention to oppress.

I come now, Mr. President, to notice some of the charges embraced by the fourth article: and first the refusal to continue the case of Callender till the next term. To prove the correctness of this refusal in point of law, I desire no better authority than that produced by the honorable managers themselves from 6 Bacon's abridgment, new edition, page 652. It is there laid down on the authority of Tidd's practice 500, 3 Burrows 1514, and 1 Black. Rep. 436, that "where there is no cause of suspicion, the affidavit to put off the trial on account of the absence of a material witness, is sufficient in the common form: namely, that the person absent is a material witness, without whose testi-

mony the defendant cannot safely proceed to trial; that he has endeavored without effect to get him subpoenaed, but that he is in hopes of procuring his future attendance. But if there be any cause of suspicion, the court should be satisfied from circumstances; first, that the person absent is a material witness; secondly, that the person applying has not been guilty of any laches, and thirdly, that he is in reasonable expectation of being able to procure his attendance at some future time." Here it appears that even where there is no cause of suspicion, that is no cause of suspecting, that the application for a continuance is made merely for the purpose of delay, still the affidavit must state, that the party applying for the continuance, "is in hopes of procuring the future attendance of the witness." The affidavit in Callender's case will be found to contain no such statement and is, therefore, clearly insufficient, even had the case been free from suspicion of affected delay. But is it possible for any man to say, that it was free from such suspicion, after having heard the testimony delivered at this bar? Has not the leading counsel for Callender, who filed this affidavit, and made the motion for a continuance, impliedly acknowledged that his sole object was delay? Has he not acknowledged that he knew Callender to be incapable of defense, on any other ground than the unconstitutionality of the sedition law; and consequently that he knew the absent witnesses to be unnecessary, and was as well prepared for trial without them as he could be with them; since nothing that they could prove could have any effect on that question? Has he not expressly declared that one great object which he had in wishing for the continuance, was to get the trial before a different judge? When this is admitted by the learned gentleman himself to have been the truth, was it very unnatural that the respondent should suspect it? If he had ground for suspecting it, of which he was to judge, the authority informs us that there ought to have been circumstances stated by the affidavit, sufficient to satisfy him, that the absent witnesses were material, and that the party applying was in reasonable

expectation of being able to procure their attendance at some other time. No such expectation is stated in the affidavit, which was clearly insufficient on that ground; and a comparison of it with the indictment plainly shows that the absent witnesses were not material.

The learned managers are therefore entitled to our thanks for furnishing us with an authority which conclusively established our case.

But admitting the respondent to have decided incorrectly in refusing the continuance, where is the evidence of improper intention? If it was an honest error in judgment, he is free from blame. And how can we doubt the uprightness of his intentions when we recollect that although he considered himself unauthorized to grant a continuance till the next term, because it was not a matter of mere discretion, and no legal ground for it was in his opinion shown, he yet offered a postponement for six weeks, which it was in his power to grant without legal cause? This offer to postpone for six weeks, which throws so strong a light of upright intention and humane indulgence, on the whole conduct of the respondent, has been forgotten by Mr. Hay; but fortunately for us, it is distinctly remembered by three or four most respectable witnesses; and especially by Mr. Edmond Lee and Mr. William Marshall. There can be no doubt of the fact. It is even manifest that three or four months would have been allowed, had they been asked for. To give six weeks would have made it necessary for the judge to return home, in order to hold the court in Delaware; and when he had returned, it would have been more agreeable and convenient to remain for some time at home, than to hurry immediately back to Richmond, in order to hold the court at the end of six weeks. How is this humane and accommodating offer to postpone, at a great inconvenience to himself, to be reconciled with a corrupt disposition to oppress Callender? And why should the respondent refuse to continue the case till the next term, which would have exposed him to no inconvenience or trouble, and yet offer to postpone it for six weeks at the expense of a new journey to Richmond? If

could have been for no other reason than a belief that he was obliged by the law to refuse the continuance, and a desire to indulge the traverser and his counsel as far as the rules of law would permit.

Here again, I forbear to inquire into the motives of Candler's counsel for refusing this indulgence, by which they would have completely obtained all the legal and proper objects of a continuance. With their motives we have nothing to do. It is into the motives of the judge alone that we are bound to inquire; and of the purity of them this offer so indulgent and humane, and so unaccountably rejected, leaves no doubt.

As to the rule, unusual and contemptuous expressions, which are charged under the fourth article, and have been detailed by one of the witnesses for the prosecution, it is material to remark how different an impression these expressions made on different persons, according to the various states of mind in which they were heard. Mr. Hay was so highly irritated as to construe a bow into an affront. There had been much mirth at his expense, in which, Col. Taylor tells us, he did not at all partake; and he thought those expressions rude and contemptuous. To Col. Taylor, who, though perhaps not inclined to view the respondent's conduct with very favorable eyes, had not the same causes of irritation with Mr. Hay, and was far more cool, they appeared in the less exceptionable light of "imperative, sarcastic and witty." Mr. Gooch may be considered perhaps as favorably inclined towards the respondent, but has shown no disposition to extenuate his conduct, and he regarded these expressions, as mere efforts on the part of the respondent, to show his wit. Wit, I allow, has nothing to do on the bench. If a judge should happen to possess it, attempts to display it in the discharge of his official duties, would perhaps be unbecoming or even improper; but certainly not criminal. To Mr. Bassett, who appears to be of a warmer temperament, and whose feelings seem to lean towards the respondent, those expressions appeared to be firm without being imperative, and facetious but not sarcastic. And is

criminality to be inferred from acts, which thus receive their hue, not from anything in themselves perceptible to this honorable court, but from the characters, the feelings and modes of thinking of those who relate to them? If so, then innocence and guilt must depend not on the conduct of the accused, but on the temper and discernment of the witnesses. The chief justice of the United States, who was present during all those transactions, saw nothing improper or unusual in the conduct of Judge Chase. These expressions, which so forcibly struck the heated and angry mind of Mr. Hay, conveyed no idea of impropriety to the mind of the chief justice; a gentleman as remarkable for the delicacy of his manners, as for quick discernment and fond understanding. Mr. Edmund Randolph was in court during a great part of Callender's trial, and he perceived in the conduct of the court, nothing rude, unusual or indicative of a disposition to oppress. I appeal to all who have the pleasure of knowing that gentleman, whether such conduct could have taken place, without arresting his attention. So remarkable himself for urbanity of manners and correctness of personal deportment, he must have been shocked by so glaring a departure from them, in a judge, seated on the bench. That lively and instinctive sense of propriety, which forms the basis of refined good breeding, would have made him feelingly alive to such a departure, in such a place, from that line of conduct which decorum no less than duty prescribes to a judge. On those finely attuned nerves, which render him the delight of every social circle where he appears, expressions, rude and contemptuous would have granted most harshly, and would have made an impression not to be forgotten. Yet Mr. Randolph remembers no such expressions.

And we find no less difference between the different witnesses, respecting the specific terms of these expressions, than respecting their general character. Of this one instance may suffice. Mr. Hay has stated that the respondent interrupted Mr. Wirt, and rudely and peremptorily ordered him to sit down. The expressions which this witness attributes to the respondent, on this occasion are, "sit down, sir;" than which

the language furnishes none more harsh or indecorous. But from the testimony of Mr. Robertson, a distinterested spectator, who took down in shorthand all that passed at the trial, it appears that the expressions addressed to Mr. Wirt were, "please sir to be seated." And Mr. Gooch, who attended the trial for the express purpose of observing all that passed, states that the respondent, being about to deliver an opinion while Mr. Wirt was up, said to that gentleman, "please sir to take your seat." Thus it is that passion distorts every object to the view, magnifies mole hills into mountains, and converts the most complaisant phrases into "rude, unusual and contemptuous expressions!" To the heated imagination of Mr. Hay, the expressions which he has detailed no doubt appeared in that light; but this honorable court will be guided, not by the exaggerated and distorted views presented to his irritated mind, but by the testimony of those calm and dispassionate spectators, who were able to view the subject through an unclouded medium.

Let me now, Mr. President, be indulged in one or two remarks, respecting the interruptions of counsel, which form one of the charges under this article. Mr. William Marshall has told us that he remembers a case, in which counsel were more frequently interrupted by Judge Iredell, than they were on this occasion by the respondent. We all know the character of that eminent and excellent judge, whose just eulogium the honorable managers have pronounced at this bar, and whose example they have set up as a standard, whereby to measure the conduct of the respondent. Will they not in this instance consent to be judged by their own rule? Will they still insist on condemning the respondent, that which has been practiced to a greater extent by Judge Iredell?

But we know the cause which produced the greater part of these interruptions, and which rendered them proper and necessary. Mr. Bassett has informed us that Callender's counsel appeared to rest their case, wholly, on the unconstitutionality of the sedition law; that they wished to argue this point before the jury, and had flattered themselves with

the hope of success; that after the court had formally declared this attempt to be improper, and that the jury could not take cognizance of the question, they continually renewed the attempt, and as often as they did so were stopped by the court. This statement is supported by Mr. Gooch and Colonel Gamble. And will any man say that under such circumstances, it was not proper to interrupt the counsel? Will any man say, that counsel ought to be suffered to fly in the face of the court's authority, and to set at naught its orders and decision?

These interruptions, moreover, as the chief justice has informed us, were made in the ordinary manner of the judge, and were not more frequent, than was usual with him in civil cases. Therefore they afford no proof of an oppressive disposition towards Callender, or of an improper disposition towards any person. They afford proofs of that promptness, sometimes bordering on precipitation, which is well known to make part of his character. It is in proof, by the testimony of Mr. Pursiance, who has long practiced in courts where the respondent presided, that he is much in the habit of interrupting counsel, even those to whom he is known to be most strongly attached; that in his interruptions there is no discrimination, between his friends and those who are not so; and that if counsel when thus interrupted keep their temper, and coolly and respectfully insist on their right to be heard, they never fail to obtain a hearing, and frequently succeed in removing impressions, which the judge had too hastily taken up against their cause. If here be weakness, there is magnanimity which atones for it. And if in this case Mr. Hay, instead of contemptuously leaving the court, when he thought himself improperly interrupted, had maintained his ground with firmness, but with that respectful manner also which was due to the age and station of the judge, and which would have been highly becoming in himself, there is no doubt that he would have obtained as full a hearing as he could have desired.

On the "indecent solicitude" charged by this article to have been manifested by the respondent for the conviction of

Callender, I will remark, that if its existence had been proved, still it broke out into no overt act of oppression or injustice, and therefore is not the object of punishment, or of judicial cognizance. Intentions, unless accompanied by acts, solicitudes and wishes, unless carried into effect, are offenses unknown to our criminal code, and inconsistent with the principles of our constitution.

The fifth and sixth charges, relative to the operation of the Virginia laws on the case of Callender, and their supposed violation by the respondent, have been so ably and clearly refuted, by my two learned colleagues who immediately preceded me, that nothing remains to be said on those points. I will merely remark, that had an error been committed, in awarding a *capias* against Callender on the presentment, and making it returnable to the court then sitting, it would have been the error of the district attorney and the clerk, for which the respondent could have been in no manner answerable. It is in evidence by the testimony of the clerk himself, Mr. William Marshall, that when the presentment against Callender was returned into court, the respondent, then sitting alone, asked Mr. Nelson, the district attorney, what was the proper process in such a case; who answered, a *capias*; and that the *capias* which actually issued, was immediately drawn up at the bar by the clerk, was inspected by Mr. Nelson, and was then ordered by the judge. In a case of this nature, relating to the local laws and practice of the state, the respondent, being then unassisted by the district judge, could apply to no better guide than the clerk and the district attorney, both at that time practitioners in the state courts; and had they led him into an error, which they certainly did not, it would be the height of absurdity as well as of injustice, to impute it to him as an offense.

I have now, Mr. President, concluded my remarks on those charges, which arise out of the trial of Callender.

*Mr. Randolph.* With the consent of the respondent's counsel I wish to examine Mr. Hugh Holmes, a witness who has been summoned and in attendance, to corroborate the testimony of Mr. Heath.

*Mr. Harper* gave his consent, but a SENATOR objected on the ground



that after the evidence was closed and the arguments commenced, no new testimony could regularly be received; not even by consent. The question being taken, there appeared a majority for receiving the testimony.

*Hugh Holmes.* Was in Richmond in May, 1800, while the circuit court was sitting. During that time Mr. Heath informed me that he had gone to Judge Chase's chambers on business and while there Mr. Randolph, the marshal, came in with a paper in his hand and that Judge Chase asked him what it contained—that the reply was that it was the panel of the jury to try Callender. Judge Chase asked him whether there was a certain description of people on it and if there were, to strike them off.

This conversation was related to me during this time. The impression on my mind it must have been, if related in May, because I am certain I left

Richmond on the Sunday after the commencement of the circuit court. It might have been told me the September following when I attended the chancery court where Mr. Heath, Judge Brooke, General Minor and myself practiced; think Judge Brooke and General Minor were present when Mr. Heath related the conversation; was not present at the trial of Callender.

I left Richmond on a Sunday and Callender was tried on the Tuesday week following.

*Mr. Harper.* Do you recollect on what day Mr. Heath related this conversation to you? I do not. What time of the day was it? My impressions are that it was in the evening.

*Mr. Harper.* This testimony of Mr. Holmes, Mr. President, completes the overthrow of John Heath, whom it was adduced to support. It adds the last clench to the nail, by which his testimony is fixed on high. This honorable court will recollect that John Heath declared, that as soon as the conversation between Judge Chase and the marshal, about striking those "creatures called democrats" from the jury summoned to try Callender took place, which was in the morning before the court met, he went immediately on the hill, and related that conversation to Hugh Holmes. This, consequently, must have happened before Mr. Holmes left Richmond. He tells us that he left Richmond on Sunday which was the 25th of May. We know from the record evidence in the cause, as well as from the testimony of Mr. William Marshall and some other witnesses, that Callender was not brought to Richmond until the 27th of May. And it is

well known that by the practice of Virginia, a jury is never summoned to try an offender, till he is before the court, and puts himself upon trial. Consequently, at the time when John Heath informed Mr. Holmes that he had seen the marshal present to the respondent, the panel of jurors summoned for the trial of Callender, and had heard the respondent tell the marshal to strike off all the "creatures called democrats," it is perfectly certain that no jury had been summoned; that the marshal had not taken Callender; that it was perfectly uncertain whether he would be taken; and that no such circumstance as Heath related to Mr. Holmes could possibly have taken place. For this flat contradiction of their witness, we are indebted to the honorable managers, and we tender them our thanks. They have furnished us, by the testimony of the same respectable witness, with another contradiction of minor importance, but not undeserving of notice. Heath says that he made this communication to Mr. Holmes in the morning. Mr. Holmes states, as his strong belief, that it was made in the evening. So much for the testimony of Mr. John Heath; which I leave, without further remark, where it has been placed by Mr. David Mead Randolph, Mr. William Marshall and Mr. Holmes; and proceed to consider the transactions at Newcastle in Delaware, which forms the matter of the seventh charge.

And here three questions present themselves for examination. What was the respondent's conduct on that occasion? How far was that conduct conformable to duty and propriety? What were the motives from which it proceeded? On all the previous articles, the same division of the matter presented itself to the mind; but the two first grounds were fully occupied by my learned colleagues. What remained for me belonged almost entirely to the third division. Here, and on the eighth charge, being deprived of their able assistance, it is incumbent on me to consider the subject, under each of these three points of view.

As to the conduct of the respondent, he admits in substance that he did, on the first day of the court, decline to discharge the grand jury on their request; did state to them

some information which he had received, respecting a seditious printer in the town of Wilmington, who was said to be in the habit of violating the act of Congress called the sedition law; and did inform them that it was their duty to inquire into that affair. He also admits that he requested the district attorney to assist them with his advice, in making this inquiry. But he denies that he did utter those expressions, relative to a seditious temper in the State of Delaware or any part of it, with which he is charged.

That he uttered those expressions is sworn by Mr. George Read, the district attorney of Delaware, and Mr. Lee, one of the grand jurors. Four witnesses on the contrary, equally respectable and equally intelligent with Mr. Read and Mr. Lee, have deposed that they were present, that they attended particularly to what passed, and that they heard no such expressions. First Judge Bedford, who sat by the side of the respondent at that time, who must have heard all that was said, and who appears to have remarked particularly what the respondent said, on the subject of seditious publications; for he afterwards told him, that he had used expressions which would give offense. Yet Judge Bedford did not hear any such expressions as are stated by Mr. Reed and Mr. Lee. Next Mr. Vandyke, the attorney general of the State of Delaware; a gentleman of high character, whose manner of delivering his testimony, proves him to be very capable of accurate observation. He attended in court at this time, and was attentive to the proceedings; but he heard nothing of these remarkable expressions. Then Mr. Hamilton, who attended the court as an assistant to his father, the marshal, sat near the judges, listened to the conversations between the respondent and the jury, but heard nothing of these remarkable expressions. And fourthly, Mr. Hall, who was in court during the whole time, paid particular attention to what passed, but heard nothing of this seditious temper in the State of Delaware, and particularly in the county of Newcastle, and more especially in the town of Wilmington. On Mr. Moore so much stress cannot be laid, as on the former witnesses, because he was not particularly attentive to

what passed on the first day. Leaving him, however, out of the case, we have four witnesses against two; and those four witnesses were so situated, that they must have heard those expressions had they been uttered, and must have remarked them. Judge Bedford did remark expressions far less strong, which he was apprehensive might give offense. Is it possible then to believe that those very offensive expressions, had they fallen from the respondent, could have escaped his notice?

But there is another piece of evidence, still stronger than the testimony of these witnesses. We know that within a day or two after these transactions took place, an account of them was published by the printer, and in the Gazette, which had been the object of the respondent's animadversion. This publication is in evidence before the court. It is sufficiently exaggerated, but it makes no mention of these remarkable and offensive expressions. This printer, it is very evident, was extremely well disposed, to represent the respondent's conduct in the most unfavorable light that truth would justify. He no doubt received his information of what passed, from persons who felt the same disposition. Those persons must have heard these expressions had they been uttered, must have been struck by them, and surely would not have suppressed them.

When this mass of evidence stands opposed to Mr. Reed and Mr. Lee, can we hesitate to pronounce that they have stated what never took place? I am far from intending to charge them with intentional departure from truth. No doubt they understood in this manner something that was said. But it is plain that there must be a mistake somewhere. Their testimony cannot be reconciled with that of the four witnesses for the respondent; or of the printer, which, under the circumstances of this case, is stronger than all the rest. And it is much more probable that two men should be mistaken than four; and that all the six should be mistaken, than that this printer should have been uninformed of, or should have omitted to notice, those expressions, if they had been used by the respondent.

These expressions, indeed, contain nothing criminal. To use them would not have been an impeachable offense, but it would have been an act of great indecorum and impropriety. It was the duty of the judge to charge the grand jury and to point their attention to any specific offenses against the laws of the United States, which had come within his knowledge or information, but to utter indiscriminate abuse against a whole state or county, to charge the people of it generally with a seditious temper, would have been equally extra-judicial and unbecoming. This consideration, we hope, will be admitted as an apology, for occupying so much time in the refutation of a charge, which in every other point of view is manifestly frivolous and futile. We wish to rescue the conduct of our honorable client from the imputation of impropriety as well as of guilt.

It may perhaps be replied, that we rely on merely negative testimony to disprove these expressions, while positive testimony is adduced to prove them. But whether testimony ought to be regarded as positive or merely negative, depends on the situation of the witnesses, and the circumstances of the case. When a man swears that he did not see a transaction, which might well have taken place without his seeing it, his testimony is merely negative, and can have no weight against that of a witness, who swears that he did see the transaction. But when it is of such a nature that it could not possibly, or within the bounds of reasonable probability, have taken place, without being seen by the person who swears that he did not see it, the testimony of such person then assumes the character and possesses the weight of positive testimony. It is the same as if he had sworn positively that no such transaction did take place. If, for instance, a witness were to swear that he saw a man standing with his hat on during the whole of this trial, in the open space on the floor between the president and me and every other person present were to swear, as they no doubt would, that they had seen no such person, surely no man in his senses would put this on the footing of mere negative testimony, and contend that the first witness was to be believed

against all the others! And where is the difference between the two cases? It consists, I answer, solely in the number of witnesses, for it is as impossible that those expressions should have been uttered by the respondent, without being heard by Judge Bedford, Mr. Vandyke, Mr. Hamilton, and the persons who gave information to the printer, as that a man should stand for an hour with his hat on, in the middle of this floor without being observed by the audience.

We are, therefore, warranted in laying these expressions out of the case; and then to what does it amount? There was a law of the United States, for the punishment of seditious libels, which the respondent, as judge of the circuit court for Delaware, was bound to enforce in that district. On his way to the court he receives information that certain habitual violations of this law are committed within the district. This information is given to him, as appears from the testimony of Mr. Hall, by a justice of the peace for that district, whose duty it was to attend to such offenses, and to take all legal steps for bringing the offenders to justice. The information, derived from this official and authentic source, the respondent communicates to the grand jury; observing to them that it was their duty to inquire into the matter, and that they must remain in session one day more, for that purpose. He goes further. He requests, or, if the honorable managers will have it so, he orders, the district attorney to assist them with his advice in making this inquiry; and directs a file of the newspapers, supposed to contain these libellous publications, to be procured and laid before them. This is the "head and front of his offending." And will the honorable managers be pleased to point out the rule or principle of law, that was violated by these acts? Will they be so good as to inform us, whether it was not the duty of the grand jury, to inquire concerning offenses within the district, and of the judge to give in charge to them, all such offenses as had come to his knowledge? Suppose that instead of a breach of the sedition law, a piracy had taken place on the high seas, and information had been given to the judge, that the pirates were lurking in the district of

Delaware, would it not have been his duty to state this information to the grand jury, and to direct them to inquire concerning the offense? And I again call on the honorable gentlemen, as I had occasion to do in a former part of the case, to inform us by what authority and what criterion, a judge is to distinguish some offenses from others, to prosecute some, and let others, as far as depends on him, escape with impunity.

The honorable gentleman who opened the case on the part of the prosecution, admitted distinctly, in his opening speech that a judge may properly be zealous and active, in the execution of the criminal law generally; and he bestowed very high, and probably very just, encomiums on a judge of Virginia, whom he represents as thus zealous and active. But it is zeal and activity in the execution of this particular law that he imputes as a crime to the respondent.

But if this zeal and activity in the respondent be not confined to this particular law, of which there is not the least proof or pretense; how, I ask, can it be an offense, according to the principle of the honorable gentleman? Surely each particular law is a part of the whole body of law. How, will the honorable gentleman be pleased to inform us, is it possible to be zealous and active as to the whole, without being so as to each of the parts? Will he inform us how the laws can be executed except by parts; and whether it ever did or could happen, that they were all violated at once.

There is, however, a more serious objection to this principle, which, if it be correct, goes to invest the judiciary with a power infinitely more formidable and alarming, than has ever yet been contended for, in this, or, as far as I know, in any country.

In what part of our constitution, or of our system of jurisprudence, have the honorable gentlemen found this dispensing power of the judges, over a part of the laws? Was not the sedition act, while it continued in force, a law of the land? Were the courts of justice to neglect its execution, because it had been opposed by a political party in the legis-

lature, or was disagreeable to a portion of the people? Are the honorable gentlemen willing to be tried by this their principle? Let them, before they answer in the affirmative, examine how far it will carry them. We now have circuit courts and associate judges to hold them. We now have, and probably always shall have, parties in Congress and in the country. It is very possible that laws may be passed, which will be highly disagreeable to one of those parties. Are gentlemen prepared to say, that the judges may dispense with the execution of all laws, which they suppose to be of this description? If gentlemen find this principle intolerable and absurd, when applied to laws passed by themselves, will they still insist on its application to such, as were heretofore passed against their opinion? Or will they contend that the question, whether a person shall be punished for the violation of a law, shall depend on the popularity or unpopularity of the law in the particular district where the offense is committed? Is a judge, appointed to hold a criminal court, to inquire from the people of the district, or from popular leaders, what laws he shall execute? Ought he to take his information on this subject from political parties, instead of the statute book? Would this be living under equal laws, equally impartially and steadily administered? And do not such laws so administered, constitute the very essence and definition of free government?

On principle then, even the principle admitted by the honorable gentleman himself, who opened the prosecution, the conduct of the respondent in directing the attention of the grand jury to this offense, is strictly justifiable. But it does not rest on principle alone. It is strongly supported by precedent, both in England and this country. In the *Lawyers' Magazine*, an authentic collection of legal proceedings and adjudications, vol. 3, page 333, we find a charge delivered to a grand jury by Chief Baron Perryn, in which he calls their attention to certain particular offenses. In page 384, of the same book, we find Lord Loughborough calling the attention of a grand jury to particular offenses. In the fifth volume of the same work, page 199, there appears a



charge of Judge Ashhurst, in which he directs the attention of the grand jury to certain seditious printers. And in the report of Hardy's trial, we see the celebrated Judge Eyre, as illustrious for his justice, humanity and love of liberty, as for his profound knowledge of the law, and his great talents as a judge, directing the attention of a grand jury to a particular offense.

Passing from England to this country, we find Judge Iredell, whose example has so often been held up for imitation, directing the attention of the grand jury in a very particular and emphatical manner, to the particular case of the Northampton insurgents. This took place at the circuit court at which those insurgents were to be tried; and the charge was delivered to the same grand jury, which found the first indictment against John Fries. And we have another authority more directly in point, because it occurred in the case of a supposed libellous publication. It is also furnished by a judge of great legal reputation and talents, whom I trust the honorable gentleman will not consider as inimical to liberty, or disposed to judicial oppression. I mean Mr. McKean, formerly chief justice and now governor of Pennsylvania. In a charge delivered to a grand jury of the city and county of Philadelphia, on the 27th of November, 1797, after a very elaborate and luminous exposition of the law relative to libels, he informs them that a certain printer in that city, meaning Cobbett, the publisher of *Porcupine's Gazette*, was and long had been in the habit of offending against this law, by the publication of scandalous and malicious libels; that he had interfered, and endeavored to arrest the progress of this offender, by binding him over to be of the good behavior; that the printer, in contempt of his recognizance, and in defiance of the authority of the law, persisted in his mischievous course; and that the duty of arresting him now devolved on the grand jury by whom alone the strong corrections appearing to be necessary could be applied. The expressions used by this learned and able judge are strong and remarkable.

It will be remarked that the printer in this case had not

been bound over to appear at the court, and answer for a libel; but had been bound in a recognizance to be of good behavior, which he was supposed to have violated by publishing further libels. On this recognizance a civil action had been brought, and the grand jury, who had nothing to do with the recognizance, nor any information before them, were thus called upon to apply a further corrective, by presenting the offender. It is impossible that a case should be more exactly in point. Indeed it goes much farther than the conduct of the respondent at Newcastle.

I am far from condemning, or calling in question, the conduct of the late chief justice of Pennsylvania, in this instance. But I contend that the same act which has been considered as proper in him, ought not to be imputed as a crime to my honorable client.

Thus we see that the conduct of the respondent in this instance was strictly correct, whether it be tested by principle or precedent. If this could be doubted, if it were even admitted that he acted incorrectly, it would still be clear that he acted from proper motives; that his error was a mere error of judgment; and consequently cannot be the ground of a conviction or impeachment.

Had he been conscious of improper intentions, how easy was it for him to accomplish his object, without appearing in the business! When Dr. McMecken, from whom, as Mr. Hall tells us, the respondent received the information, mentioned these publications to him, it would have been easy to request that gentleman to give the information to the grand jury. Dr. McMecken no doubt would have complied with the request; the grand jury would have obtained the information; the printer, had it appeared proper to them, would have been prosecuted; and the respondent would have attained his end, without in the least exposing himself to view. Would he not have acted thus, had he been conscious of improper designs? With criminal plans of oppression in his mind, would he not have sought concealment, where it was so easily practiced, and could in no degree have impeded his projects? Undoubtedly he would. Nothing but a conscious-

ness of upright views could have induced him, in such circumstances, to act this frank and open part.

In judging of men's motives it is material also to listen to their private conversations, addressed at the time to those in whom they have confidence. In such conversations the hearts of the most cautious are apt to expand, and the most hidden views are sometimes disclosed. What was the respondent's reply to Judge Bedford, when that gentleman censured him for acting imprudently, in recommending in that part of the country, an inquiry into offenses against the sedition law? "My dear Bedford," to use the beautiful language of the respondent, as repeated by the witness; "my dear Bedford, no matter where we are, nor among whom we are, we must do our duty." This, sir, is the language of the heart; not of a corrupt heart, filled with plans of oppression and violence, but of a heart manly upright and honorable. It bears the intrinsic character and the stamp of sincerity and truth. It is a frank and unstudied avowal of motives, made to a confidential friend in an unsuspecting moment; and it is of more avail than volumes of testimony to show the real impressions under which he acted.

Remember, too, how readily, and in what good humor, the respondent gave up this point, and acquiesced in the opinion of the grand jury and the district attorney, when they declared that they had found nothing libellous in the papers. Having acted from a sense of duty in calling the attention of the grand jury to the subject he was content with having discharged his duty, and pressed the matter no further. But had he acted from a vindictive spirit of oppression, or any other improper motive, inducing him to wish for the prosecution of the printer; would he so readily have desisted? The file of papers was within his reach. We who have examined it, know that he might have found in its libellous matter enough. And would he not have examined it? Would he not have pointed out the libellous passages to the grand jury? Would he not have sent them out again, with stronger injunctions to do their duty? Do oppressors so readily abandon their projects when the accomplishment is so much in

their power? No, sir. This conduct in the respondent is utterly inconsistent with any other motive than that sense of duty, under which it is manifest that he acted throughout.

We come now, Mr. President, to the eighth charge; under which I find myself again obliged to perform the disagreeable task of contrasting evidence and controverting the testimony of a witness for the prosecution. This witness, Mr. Montgomery, has attributed to the respondent expression relative to the character, motives and views of the present administration, which, had he uttered them from the bench, ought to draw on him the censure of the public and the severe animadversion of this tribunal. These expressions I am authorized by him expressly to deny and disclaim. He contends that according to the custom of this country, subsisting for almost thirty years, without any mark of public disapprobation, he had a right to warn his fellow-citizens in a charge from the bench, against the political dangers by which he believed them to be threatened; to assist in this manner in averting impending ruin; in snatching the people of his native state from an abyss into which he thought them about to plunge. He contends that for this purpose and according to this custom, he had a right to point out what he considered as the pernicious tendency of certain measures of the federal government in order to show in a stronger light, the danger of adopting similar measures in the state. This is what he did and what he supposed himself authorized to do. But he neither claims, nor has exercised the privilege of abusing those who have been appointed to administer the government of his country; nor of passing strictures in his official capacity, on their character, motives and general conduct. However he may differ from them in political opinion; however he may disapprove their principles; whatever apprehensions he may entertain about the tendency of their measures; he has always inculcated obedience to them in the exercise of their constitutional powers and has carefully avoided any remarks in his judicial character on their system, views and conduct. When he could not approve their measures he was silent, except in this

single instance; where, in order to dissuade the people of Maryland from the adoption of a constitutional amendment then under consideration which he conceived to be fraught with so many evils he adverted to the consequences likely, in his judgment, to flow from one of those measures.

Those very reprehensible expressions, "that the present administration was weak, incapable and unequal to the proper discharge of their duties; and that the object of their measures was not to promote the public good, but to preserve unfairly acquired power;" are attributed to the respondent by one witness alone, Mr. Montgomery of Maryland. How far that witness is entitled to credit, in this particular, it is my duty to inquire.

Let us advert, Mr. President, to the state of mind in which this witness was, at the time when those expressions are supposed to have been uttered.

He informs us that he was the author and chief supporter of those measures of the Maryland legislature against which the respondent levelled his artillery; that he considered himself as particularly pointed at, and supposed the eyes of the audience to be turned upon him. So greatly was he irritated by this imaginary attack on himself that as he left the room, after the charge was finished, he declared that the respondent should be impeached for that charge. This we learn from the testimony of Mr. McMecken, who heard the declaration. After he went home he wrote an inflammatory piece for the press, purporting to be the substance of the charge. This piece was avowedly written for the purpose of promoting an impeachment. It recommends that measure; abounds with the most approbrious and abusive language against the respondent; and, what is still worse, it varies very materially from the testimony which the author of it has delivered at this bar.

Is it surprising that a man in this state of mind should misconceive the truth? Is it to be wondered at that he should convert his own inferences, the misconceptions and distortions of his own heated brain into facts? Have any members of this honorable court heard a person give an ac-

count in a court of justice of a quarrel in which he had been himself a party? Of a brawl or riot in which he had been himself engaged, in which he had perhaps been beaten and of his wrongs in which he came to complain? Have they observed how the truth, in such situations is distorted by the blindness of passion, the partiality of self-love, and the thirst of revenge? I presume that they have; and they will then know how to appreciate the testimony of a witness in the state of mind in which Mr. Montgomery viewed these transactions, and in which he has given evidence at this bar.

I have said that this publication, purporting to be the substance of this charge, varies materially from his testimony in this case. For the truth of this statement I refer to the publication itself, which is in evidence before the court, and to his testimony, which is in the recollection of the honorable members. But I will point out one of the most remarkable variances. In the publication he represents the respondent as saying: "That in a country where there were equal rights and equal laws, that is laws equally administered and that operate equally upon the rich and the poor, there was freedom; but that country was not ours; we had no equal rights or equal laws." In his testimony, as taken down by the shorthand writer, he represents the respondent as saying, "that where there were equal laws and equal rights, there was freedom; but where the administration of the laws was partial and not certain, the people were not free; and that we were approaching to that state of things." In his publication he accuses the respondent of saying, we actually were in this condition; in his testimony that we were approaching to it. Is it possible to give credit to a witness who thus contradicts himself? And what assurance can we have that he whose memory is so treacherous, and who is proved by his publication to have been so angry, has not stated his own impressions and inferences as matters of fact?

This witness has indeed made an attempt to support himself, by an explanation of this part of his testimony. In his explanation he tells us that although he attributed the word "administration" to the respondent, the word used might

perhaps have been "government." In this way he endeavors to get rid of the contradiction between himself and the numerous other witnesses. But this cannot avail him. The expressions whether applied to the administration or the government, must in this instance have meant the same thing. The charges of weakness, relaxation, incapacity and a view to the continuance of their unfairly acquired power, instead of the public good, could have had no application to the government in its general abstract nature. They could have applied to it only as administered by the persons or the party now in power. So that whether the term "government" or "administration" was used, the meaning was precisely the same. The expressions were equally remarkable in one case as in the other. They must have struck the bystanders as much, in one case as in the other. They were in fact the same, with the variance of a single word, which did not in the least vary the sense. The witnesses have all sworn that they heard no such expressions; and the contradiction is as strong after the explanation as it was before.

Who are those witnesses thus standing opposed to Mr. Montgomery? Those witnesses that were present, and attentive, and yet did not hear those remarkable expressions which he heard so distinctly and which he tells us made so strong an impression on his mind? If when he stood on his own merits and on the comparison between his publication and his testimony, he was so weak, how must he appear when opposed by this host of witnesses?

First, Mr. Mason. That gentleman, indeed, was so much occupied by the salutations of his friends, that he did not attend accurately to the whole charge, although he had leisure enough to remark what nobody else saw; that the respondent, in the intervals of reading his charge, sometimes seemed to introduce extemporaneous observations, by way of comment on what he read. Still he has given us, with great confidence and no less accuracy, the principal points of the charge. He recollects nothing of these expressions. Can it be believed that they would not have struck him, had they been used? Mr. Mason is one of the strongest adherents, one

of the warmest and most zealous friends, of those who now administer the government. Indeed he is one of the chief props of the present administration; united with it in interest, principle and affection. He is, moreover, so accurate in his observation, and so correct in his recollection about what relates to the respondent, as to be able after a lapse of five years, to repeat a casual and jocular conversation; which is usually forgotten as soon as it passes. Can it then be believed, that so outrageous an attack on his friends, by this judge, and in such a place, could have escaped his notice, or been effaced from his memory?

Next, Mr. Smith, editor of the *National Intelligencer*, than whom the present administration certainly has not a more zealous friend. He is indeed remarkable for the devotedness of his attachment to this administration, his lively and keen sensibility to all its wrongs, real or imaginary, and his vigilant and unwearied zeal in its defense. He is, moreover, remarkable for his talent of stating in writing, whatever he has heard spoken or read; a talent into the careful cultivation and constant exercise of which, he is led by his profession. He listened attentively to this charge. After hearing it, he sat down in his chamber, the same evening, and committed the substance of it to writing; for the express purpose of publishing it in his paper. This publication he has produced and attested; and it contains no such expressions about the present administration, or the present government, as were heard by Mr. Montgomery. Is it possible to believe, that had such expressions been used, they would not have been heard by Mr. Smith; or that if he had heard them, he would have omitted them in his publication?

Mr. Stephen, too, who is known to be strongly attached to the present administration, was present at the delivering of this charge, attended to it, but heard no such expressions as those related by Mr. Montgomery. A multitude of other witnesses, who stood round the respondent, while he delivered the charge, who were all for various reasons very attentive to it, have with one voice declared that they heard no such expressions. Among them is the district judge who



sat by the side of the respondent; the clerk of the court, who sat next to him but one, and who moreover is an adherent of the present administration; the foreman of the grand jury, who stood close to the respondent, and to whom the charge was particularly addressed; and one of the judges of this district, who attended that court as a witness, and stood very near to the respondent while he delivered the charge. The others are gentlemen of the bar, men of high character, who have delivered their testimony with great accuracy and assigned with candor and precision the reasons of their belief. And all those persons declare most positively that they heard no such expressions as have been related by Mr. Montgomery about the conduct, character and views of the present administration.

Nay, more. The charge was read from a written paper, and that paper is produced in court, and proved by the person who wrote it, from a rough copy furnished by the respondent. Mr. Mason, it is true, states that some extemporaneous comments appeared to him to be made by the respondent while reading from a written paper, and the inference to be drawn from this, I presume is, that these expressions might have formed one of these extemporaneous comments; and, therefore, might have been used, though they do not appear in the paper. But Mr. Mason, it will be remembered, though very correct and positive in stating the substance, does not pretend to accuracy in the particulars. He was too much interrupted by the salutations of his friends, who pressed through the crowd to speak to him. And it may very well have happened that when, after these interruptions, he turned his attention again to the respondent, he sometimes found him with his eyes raised from the paper, as those of every man will be who reads his own composition or any writing with which he is familiar. This might have led him to conclude that the respondent sometimes spoke extempore. But Mr. Montgomery himself has stated that the whole charge was read from a paper; and the same fact has been established by the testimony of nine or ten witnesses, among whom are the district judge and the clerk of the

court. Those gentlemen sat near the respondent while he delivered the charge. One of them far next to him, and the other next but one. They were both attentive to the manner in which the charge was delivered; and they both say that it appeared to them to be entirely read. They both say that the respondent, in reading it, occasionally raised his eyes from the paper at the close of a sentence, and turned them on the audience; but not longer at any one time, than is usual with a person reading. In this the other witnesses fully concur. They all stood round the respondent, had their eyes fixed upon him during the whole time and were particularly attentive to the manner as well as the matter of the charge.

Mr. Montgomery, indeed, after he had heard the testimony of Mr. Mason explained himself on this subject. He said at first that the whole charge appeared to him to be read from a written paper. But after he heard Mr. Mason state that the respondent, in delivering the charge, sometimes appeared to leave the paper, and introduce extemporaneous matter, he was called again; and he then informed us that his eyes were not constantly directed towards the respondent, but were occasionally turned on the bystanders; whose eyes he observed to be directed to him, as the known author of the measures reprobated in the charge. From this he inferred, very properly, that the respondent might have spoken extempore, from time to time, without his observing the fact. This explanation certainly removes the contradiction, which at first appeared between Mr. Mason and Mr. Montgomery; and weakens materially the testimony of the latter gentleman as to the fact now in question. But it has no such effect on the testimony of the other witnesses, whose attention was not called off, like that of Mr. Montgomery; who had their eyes upon the respondent during the whole time; and who firmly believe that every word which he delivered, was read from the paper. This fact, then, I consider as completely established. The paper has been proved, and is in evidence before the court. A true copy of it will be found among the exhibits filed with the answer, No. 8. On exam-

ination it will be found to contain no such expressions, as are attributed to the respondent by Mr. Montgomery.

The testimony of Mr. Montgomery on this point, thus liable to suspicion in itself, on account of the state of irritation in which he saw the transaction; thus contradicted by his own written statement, by the testimony of so many witnesses, and by the written charge; is not entitled to belief, but must be laid wholly out of the case. I do not charge him with wilfully mistaking the fact; but that he has utterly mistaken it, cannot be doubted.

There is another point on which some contrariety appears in the testimony. Some of the witnesses have supposed that the respondent concluded the charge with a direct recommendation to the jury to use their endeavors on their return home, towards preventing the final passage of the act of assembly of Maryland, for abolishing the supreme courts; by procuring the election in their several counties of such persons as would vote against that measures. Others are under the impression that no such recommendation was expressly made; but was merely to be inferred from the general tenor of the charge. That such a difference of opinion should take place, is by no means surprising; but the difference is immaterial. The object of the charge undoubtedly was to dissuade the people of Maryland from adopting the measure in question, and to impress on the grand jury and the audience the necessity of exerting themselves against it, at the election which was then approaching and was to decide its fate. If this recommendation was not expressly given it was plainly implied. Such was the intention of the respondent, and his defense rests on the correctness of this intention; on his right, according to the long established custom of this country to pursue the object in this way.

Let the charge, Mr. President, be carefully examined, and it will be found to have no object in view, but to convince the people of Maryland, by arguments drawn from reason and experience, of the danger of adopting a change in their state constitution, which had been submitted to their consideration and the object of which was to abolish all their

supreme courts of law; to introduce a system entirely new and untried; and above all to destroy the independent tenure of judicial office, secured to them by their existing constitution, and to leave the judges dependent on the executive for their continuance in office and on the legislature for their support. The respondent, who had contributed largely to the formation and establishment of the state constitution, was greatly alarmed at these changes. He considered them as of the most destructive tendency, to the liberty and happiness of the state to which he belonged; and he resolved to take this opportunity of warning his fellow citizens against them. This is the whole scope of his address to the grand jury; to show the importance of an independent judiciary, the dangerous tendency of some changes already made, and the mischiefs which would result from taking this additional step, in the career of innovation. He did, indeed, advert to the act of Congress for repealing the circuit court law and remarked that it had shaken to its foundation the independence of the federal judiciary; but the manifest and sole object of this was to show, that the spirit of innovation had gone forth and ought to be carefully watched; that the public respect for great constitutional principles, had begun to be weakened; and that by how much the security which might have been derived from an independent federal judiciary, had been diminished, by so much the more vigilently it behooved us to guard our state institutions. No other object can be discovered in the charge are inferred from its general tenor or from the language in which it is expressed; neither is there any evidence, which has the most remote tendency to show, that he had any other object in view.

And was not this an object which a citizen of this country might lawfully pursue? Is it not lawful for an aged patriot of the revolution, to warn his fellow-citizens of dangers, by which he supposes their liberties and happiness to be threatened? Or will it be contended that a citizen is deprived of these rights, because he is a judge? That his office takes from him the liberty of speech, which belongs

to every citizen and is justly considered as one of our most invaluable privileges? I trust not. And if there could be any doubt on this point, I would remove it by referring to a recent instance, of two judges of the Supreme Court of Maryland, who in a late political contest, entered the lists as champions for the rival candidates and traveled over a whole county, making political speeches in opposition to each other. Yet these gentlemen justly possess the confidence and respect of the public; their conduct in this instance has never been considered as a violation of duty; and he who espoused the interests of the successful candidate has been far from receiving any marks of displeasure from the government of this country.

If therefore a judge retain this right, notwithstanding his official character; if it still be lawful for him to express his opinion of public measures, to oppose by argument such as are still pending and to exert himself for obtaining the repeal, by constitutional means of such as have been adopted; I ask what law forbids him to exercise these rights by a charge from the bench? In what part of our laws or constitution is it written, that a judge shall not speak on politics to a grand jury? Shall not advance in a charge from the bench those arguments against a public measure, which it must be admitted that he might properly employ on any other occasion? Such conduct may, perhaps, be ill-judged, indiscreet or ill-timed. I am ready to admit that it is so; for I am one of those who have always thought that political subjects ought never to be mentioned in courts of justice. But is it contrary to law? Admitting it to be indecorous and improper, which I do not admit, is every breach of decorum and propriety a crime? The rules of decorum and propriety forbid us to sing a song on the floor of Congress or whistle in a church. These would be acts of very great indecorum, but I know of no law by which they could be punished as crimes.

Will they who contend that it is contrary to law, for a judge to speak of politics to a grand jury, be pleased to

point to the law of the land which forbids it? They cannot do so. There is no such law. Neither is there any constitutional provision or principle or any custom of this country, which condemns this practice.

And will this honorable body, sitting not in a legislative but a judicial capacity, be called on to make a law; and to make it for a particular case, which has already occurred? What, sir, is the great distinction between legislative and judicial functions? Is it not that the former is to make the law for future cases and that the latter is to declare it, as to cases which have already happened? Is it not one of the fundamental principles of our constitution and an essential ingredient of free government that the legislative and judicial powers shall be kept distinct and separate? That the power of making the general law for future cases shall never be blended in the same hands, with that of declaring and applying it to particular and present cases? Does not the union of these two powers in the same hands, constitute the worst of despotisms? What, sir, is the peculiar and distinguishing characteristics of despotism? It consists in this, sir: that a man may be punished for an act which when he did it was not forbidden by law. While, on the other hand, it is the essence of freedom that no act can be treated as a crime unless there were a precise law forbidding it at the time when it was done.

It is this line which separates liberty from slavery; and if the respondent be condemned to punishment for an act, which far from being forbidden by any law of the land, is sanctioned by the custom of this country for more than twenty years past, then have we the form of free government, but the substance of despotism.

Let gentlemen, before they establish this principle, recollect that it is a two-edged sword. Let them remember that power must often change hands in popular governments and that after every struggle the victorious party comes into power with resentments to gratify by the destruction of their vanquished opponents with a thirst of vengeance

to be flaked in their blood. Let them remember that principles and precedents, by which actions innocent when they were done may be converted into crimes, are the most convenient and effectual instruments of revenge and destruction, with which a victorious party can be furnished. Let them beware how they give their sanction to principles which may soon be turned against themselves; how they forge bolts which may soon be hurled on their heads. In a popular government, where power is so fluctuating, where constitutional principles are therefore so important, for the protection of the weaker party against the violence of the stronger, it above all things behooves the party actually in power; to adhere to the principles of justice and law; left by departmenting from them, they furnish at once the provocation and the weapons for their own destruction.

I have stated, Mr. President, that the practice of introducing political matter into charges to grand juries, has been sanctioned by the custom of this country from the beginning of the revolution to this day. Need I advance any other proof of the fact, than its general notoriety? Need I refer to the charge delivered in South Carolina in 1796 by William Henry Drayton, for which he has been so much admired and applauded? Need I refer to the recommendation of the executive council of Pennsylvania, at a period something later, in which that body with John Dickinson at its head, enjoins it on the judges to avail themselves of the charges to the grand juries on their circuits, for disseminating correct political information and principles among the people? Shall I refer to the case of Judge Addison in Pennsylvania, who has delivered many political charges and against whom, when he was lately impeached, those charges made no part of the accusation? Shall I refer again to the charge of Judge Iredell, delivered to the grand jury which found the first indictment against John Fries, and containing a variety of political matter? It is unnecessary to dilate on these instances. They have been given in evidence and are fresh in the memory of this hon-

orable court. The recollection of the honorable members must furnish them with many other equally striking.

And yet have the authors of none of these political charges been censured. No mark of public or private disapprobation has been fixed on their conduct. No legislative act has forbidden this practice. From the time of Judge Drayton to the time of Judge Chase, it has been considered as innocent. It remained for the year 1803, after a lapse of twenty-seven years, to discover its criminality. But this honorable body will not so determine. It will not forget the distinction between its judicial and its legislative character. In its judicial character it will declare that an act, however improper in itself or dangerous in its tendency, shall not, if forbidden by no law, be punished as a crime; that the prevalence of this custom for twenty-seven years, the countenance which it received from some governmental authorities and the acquiescence of all, are sufficient evidence of its legality; and that the criminal intent which constitutes an essential ingredient of the offense, in this as in every other case and of which no direct proof is now adduced, can never be inferred from the act itself, when done in compliance with a custom so long established and so highly sanctioned. But if the members of this tribunal should be individually of opinion, that this custom is dangerous or improper, they will after pronouncing a sentence of acquittal in this case, resume their legislative character and pass a law to restrain the practice in future. Thus will the mischief be prevented on one hand and the principles of liberty and justice respected on the other.

This charge, therefore, fails like the rest; and what remains of the accusation? It has dwindled into nothing. It has been scattered by the rays of truth, like the mists of the morning, before the effulgence of the rising sun. Touched by the spear of investigation it has left its gigantic and terrifying form and has shrunk into a toad. Every part of our honorable client's conduct has been surveyed. All his motives have been severely scrutinized; all his actions have been brought to the test of law and the consti-



tution; his words and even his jocular conversations, have been passed in strict review; and the ingenuity and industry of the honorable managers have been unable to detect one illegal act, one proof or one fair presumption of improper motive.

Perceiving perhaps by anticipation, this desperate situation of this case, the honorable gentleman who opened the prosecution, has devised another expedient, to escape from anticipated defeat, and to ensure that conviction on which he seems to have set his heart. He has told us and no doubt will hereafter insist, that in order to form a true judgment on the respondent's conduct, the whole of it must be embraced in one view; and all the particulars regarded as parts of one whole. This means if it means any thing, that although no single act alleged in the articles, should be considered as an impeachable offense and a sufficient ground of conviction, yet all the acts taken together, may constitute such an offense. That is, in other words, that many nothings may make something; that many noughts may make a unit; that many innocent acts may make a crime. What is this but recurring, in another form, to the absurd and monstrous doctrine, that judges may be removed on impeachment, for reasons of expediency, without the proof of any specific offense? No, sir, this last subterfuge will not avail the prosecutors. This honorable court, adhering to the principles of the constitution, the positive rules of law and the plain dictates of justice and common sense, will require, before it convicts, the clear proof of a criminal intent manifested and carried into effect by some act done in violation of the laws. Under the shield of this great principle our honorable client stands secure. In full confidence that you, Mr. President, and the members of this honorable court will be guided by it, I cheerfully submit his case to you. And when you retire to deliberate on it, remember that posterity will sit in judgment on your conduct; that her decision will be pronounced on the testimony of impartial history and that from her awful sentence there lies no appeal.

*February 26.*

## MR. NICHOLSON FOR THE PROSECUTION.

*Mr. Nicholson.* The charge against the respondent in the first article is, that he delivered the opinion before counsel were heard, and in the presence of the jury, and that it tended to bias them against the prisoner. In answer to this it has been contended, that Mr. Lewis was the person who gave publicity to the opinion. Mr. Lewis could not have made known the contents of the paper, because he had no knowledge of it. It must have become known by the conduct of the judge, who informed the counsel of the contents and then threw it down on the bar table, when it was copied. All the witnesses declare they never witnessed a similar procedure. Judge Chase delivered his opinion in such a manner as tended to make an impression on the minds of the jury. Upon this point we have the testimony of Mr. Lewis and Mr. Dallas. And in his answer the judge declares, that he did inform Mr. Lewis that the court were of the same opinion concerning the law of treason, as had been before decided in the case of Vigol and Mitchell, and on the first trial of Fries. What was this, but declaring that the acts charged against Fries amounted to treason? And this opinion was delivered in the presence of all the bystanders. The jury were informed that the opinion which the court intended to give was the same which had been given before, when Fries was found guilty. The plain inference to be deduced from this declaration of the judge is, that the court had determined that Fries was guilty of treason. Counsel were restricted from citing the statutes of the United States, as well as decisions in England before the revolution. What was the reason that the counsel for Fries wished to cite those English authorities? They wished to show to the jury that the construction which had been given in England to the terms "levying war," was given in the worst of times and that the judges since the revolution had considered themselves bound by the decisions prior to that period. They wished to read the statutes of the United States to show that Congress did not consider that the offense with which Fries was charged, amounted to treason, and surely the Congress of the United States had as much right to give a construction to the terms "levying war," as the court had.

It is not contended that Judge Chase debarred the counsel by any actual interference when they were about to address the jury, but that his conduct on the first day had that tendency. Mr. Lewis stated that the judge did say, that if the counsel conceived the opinion of the court to be erroneous, they must address their arguments to the court and not to the jury. And on the second day, when Judge Chase told the counsel that they were at liberty to proceed and address the jury on the law, he added, that they must do it at the hazard of their reputation, and this was done in the presence of the jury. No doubt can exist but that the counsel were prevented from addressing the jury by the conduct of the judge, and no coun-

sel would address a jury under similar circumstances. Mr. Lewis might well use the language which he did, and was perfectly justifiable in abandoning the cause of his client, because after what had taken place, there was no hopes of rendering him any assistance by defending him.

MR. RODNEY FOR THE PROSECUTION.

*Mr. Rodney.* Regarding the first specification in the article relative to Fries. What would Judge Chase have thought had this court acted in a similar manner? Suppose at the opening of this case, the president of the court had delivered a written opinion on the law and declared that the court had maturely considered the law and that was the result of their deliberations, and that the counsel for the respondent should not recur to any authorities but what the court deemed relevant. I apprehend that Judge Chase would not have considered this a fair and impartial trial. He would have exclaimed (and with justice too) that his case was prejudged; that there was a determination to convict him. After telling Mr. Lewis to proceed and argue the law to the jury as fully as he chose, the judge observed when speaking of cases on which Mr. Lewis meant to rely, "such cases ought not, shall not go to the jury." The jury have a right to decide the law as well as the fact in criminal cases and the court have no right to decide what cases are or are not law. If the court are to decide what cases are law, the right of the jury to decide the law would be a mere name. It would be something similar to the sailor in the play of the "Tempest," who was content that his comrade should be viceroy over the island, provided he should be viceroy over him. If counsel were to cite history to the jury as law, the court would have a control over them and prevent their wasting time by reading books totally irrelevant. But the cases which the counsel for Fries were prohibited from citing were relevant. The constitution declares that treason shall consist "in levying war." The terms "levying war" are constructive.

I mean to enter my solemn protest against the opinion of the respondent on the law of treason. John Fries was not guilty of treason and he was deprived of a constitutional privilege when his counsel were prevented from arguing the law to the jury. I believe that Fries was pardoned because the then president of the United States, did believe the opinion of the court to have been erroneous. But for the interference of the president, the blood of Fries would have been shed and the respondent would have had to answer for it at the judgment seat to which he has appealed. The pardon was granted in consequence of the representation made to the president by the counsel for Fries, and if ever the arm of mercy ought to have been extended to any person condemned to die, it was extended properly in the case of Fries.

Callender was not bound to hunt for his proofs until he was presented. Some of his witnesses lived at a considerable distance from

Richmond. He went into court and stated that the witnesses which he swore to be material, would go to defeat eight out of the twenty criminal acts charged in the indictment. What was the reply given to the affidavit? It was that the witness if present, could not exculpate Callender. Did any of the members of this court ever hear of such a flagrant piece of injustice? How were the court to know but that Callender had witnesses at hand to prove the truth of the rest of the charges?

Mr. Basset was not a competent juror; the prisoner was tried by eleven jurors. His opinion was not only formed but delivered and that too in the presence of the court, and against that opinion he could not give a verdict. He had formed and delivered an opinion that the publication was libellous. That certainly was giving an opinion that Callender ought to be punished. It is not similar to say that a man, guilty of a certain crime, ought to be punished, because Mr. Basset did in fact say that Callender had been guilty of the crime.

Colonel Taylor was to prove a particular fact and because he was not acquainted with all that related to the subject his testimony was rejected. Upon what principle this decision was made, I am at a loss to conjecture. Yet this point was made that a man's testimony must prove the whole case or it is incompetent, because it would render him no service. Would it not have been proper to let the testimony of Colonel Taylor go to the jury and see whether the counsel would call another witness to prove the truth of the other part of the charge? The judge was not to determine whether the counsel had other proof in reserve or not. The respondent must in this case have acted from improper motives. He cannot say that it was a mere error in judgment, for the law is too plain. Where would have been the difference, if Callender was able to prove the truth of all the charges by many or by one witness? If any exists it is in favor of many witnesses, for they would have fortified his defense much better than if proved by one witness.

When Judge Chase went to Delaware to hold the court, he traveled in company with Doctor M'Mahon who was a grand juror and the man who gave him the information relative to the seditious printer, and yet notwithstanding he was in possession of all the facts relative to the seditious temper of the printer, the grand jury returned without any presentments or bills of indictment. It was the duty of that body to present all acts of criminality and when they declared that none had been committed, they ought to have been discharged. When, however, they returned into court and declared that they had found no presentments or bills of indictment, the passion of Judge Chase burnt into a flame. When he found that the grand juror, who had given him information respecting a seditious printer, had returned without having that printer presented, he could no longer hold his tongue. Notwithstanding that the grand jury were in possession of all the information which he had, yet he could not forbear reminding them of their duty. I know of no control which the court have over the grand jury, to

oblige them to hunt for criminality. The grand jury after replying to the answer put to them by the clerk of the court, applied to be discharged. What was the reply of Judge Chase? "That he had been informed that a highly seditious temper had manifested itself in the County of New Castle, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by every principle of virtue, and regardless of social order." Notwithstanding the printer had been up and censured by the judge as a violator of the laws, he was acquitted by the grand jury and it therefore appears that the accusation was without foundation.

MR. RANDOLPH'S CLOSING SPEECH FOR THE PROSECUTION.

*February 27.*

*Mr. Randolph.* Mr. President, after a long and able, though I fear a tedious discussion of this subject, it again becomes my duty to address you. I feel perfectly inadequate to the task of closing this important debate, on account of a severe indisposition which I labor under, but I am aided by the strong and deep interest which I take in the decision of this case. It is an interest which I am not ashamed to avow. Strange would be my composition, if a prosecution instituted at my instigation, and conducted throughout by me should be a subject of difficulty or regret to me. While I should have been much rejoiced at the acquittal of the judge, provided he had been found innocent, the next pleasure which I feel is to bring the culprit who has violated the laws of his country, to signal and condign punishment. The able manner in which this prosecution has been supported by my worthy colleagues and right excellent friends, leaves me but a barren field to glean on. I will, however, attempt to present to the court as condensed a view of the subject as I am capable of, endeavoring as much as possible to avoid the ground which my friends have trod. If guilty of a repetition of their arguments, I trust I shall be pardoned in consequence of my being absent during a part of the trial. Among the causes of regret which I experience from being forced by indisposition to be absent, the not being present when the eloquent gentleman who opened the defense (Mr. Hopkinson) spoke is not the least. I trust in God, that merit will never be disregarded,

no matter in whose defense it is employed. Report speaks loudly in his praise and I am willing to credit report and to confirm it as far as lies in my power. In the first instance I must be permitted to say a few words on the doctrine of impeachment. I have heard some observations on that subject so inconsistent with reason and so much at war with themselves, that were I to pass them over in silence, they would meet the fate which they merit. It has been contended that a civil officer is not impeachable unless the offense be an indictable one. If this be correct for what purpose was the trial by impeachment instituted? The constitution would have declared that all civil officers might be removed from office upon indictment. This would have saved us all the trouble, anxiety and expense which is experienced in the trial of this case. In addition to the cases cited by my worthy friend (Mr. Nicholson) who spoke yesterday and whose arguments on this subject were unanswerable, permit me to adduce a few other illustrations. The president of the United States is vested by the constitution with a qualified negative on all laws. Suppose he should use this power in all questions, would it not be an abuse of the power entrusted to him? It would certainly be a gross abuse of that power, which is entrusted to him to be exercised only on extraordinary occasions and under a high responsibility and would render him liable to impeachment. The president has the power of keeping in his possession all laws which are presented to him for his signature for ten days. Suppose at a session similar to the present which must expire on the fourth of March, and at which the greater part of the laws are passed within the last ten days of the session, he should return the laws to Congress on the third of March, within twenty minutes of its dissolution with his objections in writing to each of them? What would be the consequence? The yeas and nays must be called on each question in order to ascertain whether there was a constitutional majority, and before they could be taken the house of representatives must be dissolved, and the country left one year without the necessary laws. Is there a man in

existence who would not declare that this was one of the most gross abuses of power an officer could be guilty of? and yet according to the doctrine of the counsel for the respondent, the president would not be liable to impeachment and so long therefore as an officer keeps within the law, he may go to the tether of the constitution. You, Mr. President, in conjunction with the chief justice, the secretaries of state and the treasury, and the attorney general of the United States, as commissioners of the sinking fund, have at your disposal more than eight millions of dollars of the United States for the payment of their debt. Suppose you were to apply it to your own use? This would not be an indictable offense, and yet I trust it would be an impeachable one. But the learned counsel who closed the defense (Mr. Harper) knowing that this ground was trembling under his feet and that the arguments of his colleagues could not be supported, has abandoned it, but has declared that in order to support an impeachment it must be an offense against some positive law. Here we agree. The cases which I have put are offenses against that law which orders persons to exercise power with sound discretion. It is a miserable quibble to contend that the respondent is not impeachable because there is no known law prohibiting what he has done. We contend that the oath of office of the respondent to execute his high judicial functions with impartiality and without respect to persons, has been violated and therefore he has violated the law which provides for taking the oath. And this position I will not surrender to our adversaries. We charge the respondent with having been guilty of misdemeanors in office; that he has behaved improperly and partially and this the evidence proved beyond the possibility of a doubt. I shall now proceed to make a few remarks on the first article and here I must reiterate my regret at not having heard the gentleman who opened the defense and who confined his observations to this article and whose argument I wished much to have heard. I was, however, consoled by the conclusive statement of my friend who spoke yesterday on this article (Mr.

Nicholson). The observations of the counsel, which I have heard on this article, are at variance with themselves and with each other. One gentleman (Mr. Martin) stated, that no offense was committed by the respondent and referred to authorities in support of his position. The gentleman from South Carolina (Mr. Harper) admitted that an offense was committed, but that the respondent had a contrite heart and repented, and therefore this court ought in their mercy to forgive him.

*Mr. Harper.* The gentleman has entirely mistaken me, I said no such thing. I said that even supposing an offense to have been committed, the respondent made ample atonement for it, by his conduct on the second day of the trial of Fries.

The PRESIDENT. You had better suspend your explanations until the gentleman finishes.

*Mr. Randolph.* The words which I took down and which were used by the gentleman, were these, "that the error in reducing his opinion to writing, was corrected, the paper withdrawn and the counsel entreated to go on in their own way until the cup of humiliation was exhausted to the very dregs." This plainly evinces that the court conceived (as well as the counsel) that they had acted improperly. It is not mercy which the respondent has demanded, nor is he entitled to it: he must have justice and to use the expression of the gentleman not now in his seat (Mr. Key), sheer justice. I will ask if the conduct of the respondent was correct on the first day, whence this recantation on the second day? Is any man fit to preside in a court of justice who by his conduct had been obliged to make atonement by prostrating and degrading his office at the feet of an advocate? Was that the character proper to dispense justice? I apprehend not. The man who is obliged to make atonement for his conduct, is not the man who is fit to preside in the tribunals of justice. I go farther. John Fries was either an innocent man and ought to have



been acquitted, or he was a traitor to his country and ought to have expiated on the gibbet the crime which he had committed. What then must have been the conduct of the respondent, which induced the executive to pardon a most notorious offender and one to whom mercy ought not to have been bestowed, or to reduce an innocent man to the risk of death without a trial? I have understood that Fries has been represented by the gentleman who opened the defense, as not ignorant, friendless or innocent. Not ignorant or friendless said the gentleman, because he undertook to set up his opinion in opposition to that of Congress and was able to raise so many friends as to prevent the execution of a law. I am afraid that if this mode of reasoning were adopted, that the riotous mob under Lord George Gordon, in 1780, would be considered as the most learned and enlightened men of the eighteenth century, for they even undertook to expound a doctrine which arose in the church and which it was the peculiar province of the clergy to explain. If John Fries was innocent, then an innocent man has been condemned to death without a trial. If guilty, he was tried without even the forms of law and the president was obliged to sign his pardon. I hope this court will not sanction such conduct. The conduct of the counsel for Fries, merits an abler eulogium than is in my power to make. My gratitude as an American citizen and a friend of liberty, will never cease to flow to them, for they stood up against arbitrary conduct and oppression.

The learned attorney general of Maryland observed, that he trusted that the hand of a lawyer might never be polluted by any thing worse than the opinion which Mr. Lewis refused to read. I hope that the hand of an advocate will always shrink from the touch of judicial influence and corruption. Let us now go to the case of Callender and first with respect to the overruling the objections of Basset the juror. Here I must be permitted to observe that the law which has been adduced respecting jurors, has been drawn either from decisions in civil cases or decisions in England before the revolution. From star chamber deci-

sions, passed in hard and unconstitutional times. These cases are now cited in support of the conduct of the respondent, although he would not suffer cases decided in England previous to the revolution, to be cited in favor of the innocent Fries. Were these decisions to have any influence in the decision of this case? I trust not, sir. Not only star chamber decisions have been cited, but the authority of Chief Justice Keelynge. Who this Sir John Keelynge was will appear from a reference to the 4th volume of Hatsel's precedents. We find in that book, that upon complaint being made of innovations in the right of trial by jury, that a committee was appointed to investigate the conduct of Chief Justice Keelynge. This then is the authority on which the counsel for the respondent rely for the vindication of their client. I do believe that the respondent (who has been declared to be a patriot of seventy-six) will consent to be justified by such an example. I must believe sir, that the counsel for the respondent in their zeal to acquit him, have cited as law, what they knew not to be law. When I see gentlemen of their talents and legal knowledge, resorting to the authority of Keelynge, I think it a conclusive argument against their client and a full refutation of the cases cited by the attorney general of Maryland. I must be obliged to solicit the indulgence of the court, for the imperfect view of the subject which I shall be compelled to take, as I have been so unfortunate as to mislay my notes, and shall I fear be unable to lay a correct statement of the voluminous body of report before this court. I shall now proceed to the case of Basset. The counsel have told us that John Basset, did not object to serving on the jury, but only suggested a scruple of delicacy which it was the duty of the judge to overrule. Whatever might have been the opinion of the judge, Mr. Basset with all the strength of political prejudice which he so evidently manifested at this bar, did not think it perfectly correct and proper that he should serve on the jury. The respondent is charged with overruling the objection of Basset to serve on the jury. What is an objection? A

man comes forward and declares that he did not wish to serve on the jury, for certain reasons. This is not a positive denial to serve, but it certainly was an objection and such an objection was overruled in the case of Callender; and to support this decision, we are referred to the authority of Chief Justice Keelynge, and star chamber authorities. This is the strongest argument against the conduct of the respondent. With respect to the rejection of Col. Taylor's testimony, I shall bottom myself upon the admissions of the attorney general of Maryland and his inability to find in all his legal researches, but one solitary case which was deemed justificatory of the respondent and that a late case in M'Nally, which is not the best authority. That authority declares that although the court possessed the right to oblige counsel to declare what they intended to prove by their witnesses, yet it was not the practice to do it. What was said by the chief justice of the United States, on whose testimony and that of Robertson's I rely? He said that he never knew a similar case to occur as the one in which the testimony of Col. Taylor was rejected. He felt extreme pain in being obliged to speak of the conduct of a brother judge. The respondent was then the person who raised the question in the case of Col. Taylor's testimony, which was novel in Virginia, and had never been witnessed by the chief justice, who is a man infinitely superior to the respondent in every point of view. Upon the subject of the first specification in the fourth article, the learned attorney general of Maryland has cited M'Nally to show that the court have a right to compel counsel to reduce their questions to writing; but in reply to this, I bottom myself upon the testimony of Judge Marshall, who stated that where a question arose on the question itself, it was customary for the court to have it reduced to writing in order to decide with more accurateness, but that he had never known it done on any other occasion. This testimony establishes beyond a doubt, that Judge Chase acted in a manner totally novel to the judges of the United States. On the subject of the manner which the judge conducted

himself towards the counsel, I only wish to rely on the testimony of his own witnesses. While I do not wish to rely on the testimony of the counsel for Callender, I hope it will not be considered as meaning the smallest slight to them, God forbid, that I should say any thing which would in the smallest degree tend to invalidate their testimony, but they may be considered as parties concerned and it may be said they were influenced by personal feelings; on this ground therefore, I do not mean to rely on their testimony. What did the chief justice say? He said but little, but what did he look? He appeared to be conscious that the respondent had acted improperly, but he felt the delicateness of his situation in deciding on the conduct of a brother judge. What did Robertson say? That the judge always spoke in the first person. Col. Taylor declared that the conduct of the judge appeared calculated to abash the counsel and turn them into ridicule, and that it had the desired effect and that everybody laughed at the observations of the court, but the counsel. What did Gooch say? Why (to use his own phrase) that the judge appeared much in "yearnest," and that his remarks were very witty and abashed the counsel. But the attorney general of Maryland, who is never at a loss for an argument, has observed that this conduct of the judge was calculated to keep the people in a good humor. That the counsel for Callender attempted by their conduct to excite insurrection and it was proper in the judge to prevent their effecting their purpose. This argument does great credit to the ingenuity of the gentleman, but it does not justify the respondent. Where was the respondent at that time? Was he at a district remote from the seat of the government of a state, and where he could not be protected? No, sir, he was in Richmond, the capital of a state which was never disgraced by an insurrection, unless the glorious times of 1776 may be so termed. He was within a stone's throw of the residence of the then governor of Virginia—a man whom I will say nothing about, let the high stations which he has filled in the service of his country, speak for him: a

man who was at that time more interested in the safety of the respondent than he appeared to be himself: a man who trembled lest the conduct of the respondent should drive the people to madness and cause them to violate the laws. The respondent was not merely under the protection of the laws of the United States, but he was in the neighborhood of a cantonment of the troops of the United States, who would have been ready to protect him and suppress insurrection. Why those troops were brought to Richmond and kept there during the trial of Callender, is not for me to determine. But we have been told that the respondent is justified by the practice of his own state, that he conformed to the practice of the state of Maryland. Surely the practice of Maryland was not law more than that of Virginia and not more to be regarded. The respondent in one instance rests his defense on the ground that he was not bound by state laws and at the same time takes shelter under the laws and practice of the state of Maryland. It has been asked why the respondent did not conform to the character for discernment given him both by his friends and enemies. Why did he not if he wished the conviction of Callender secretly lie in wait and spring upon his prey? Simply for this reason—that there is no principle or rule more true, than that whatever is the general character of a man, he is unable always to conform to it. We find the respondent in the case of Fries on the first day, highly imperious; but afterwards, on the stool of repentance. At another tribunal this repentance may have some effect. But if this court will bear in mind that it was brought about by the manly conduct of the gentlemen of the bar, he will be entitled to no mercy before this tribunal for it.

It has been said that the doctrine contended for by the counsel for Fries, and the counsel for Callender, would prostrate our rights at the feet of juries. There may they always lie, in preference to the feet of judges. The gentleman who closed the defense (Mr. Harper) observed that we ought not to place the criminal law at the feet of the juries. Sir, it is the most glorious attribute of juries

to declare, that they have the right to decide the law as well as the fact in criminal cases.

It is conceded they have the right to find a general verdict which cannot be set aside, if in favor of the accused. Of what consequence then is it, whether this power is an incidental or direct one, so that they enjoy it? We have no power given by the constitution to punish a man for robbing the mail, but we have the power to establish post offices, and carries with it the power of punishing robberies of the mail. Gentlemen have admitted that the jury possess the power of deciding the law, yet they say they have not the right. In this tissue of self contradictions the gentlemen tell us, that the jury ought to be bound by the opinion of the court as to the law, but they have a right to decide whether the facts proved, brought the case within the law. Is there a greater contradiction than this? Are gentlemen contending for a doctrine in a capital case, which in England has been scouted in the case of a libel, that the jury are only to find the facts and the court to determine the law?

In the case of Fries, it was perfectly useless to have a jury trial. The facts, which it is contended were the only thing on which the jury had a right to decide, were agreed on by all, and the court had decided the law of treason. I deny the gentlemen's law, as well versed as they are in that science; and I do assert that if ever I am called upon to act in the capacity of a juror, I shall refuse to be bound by it. Suppose a man were indicted for treason, the constitution has defined it, and the court assuming to themselves the infallibility of the court of Rome, were to declare that a mere riot was "a levying of war;" shall I, sir, surrender my conscience to the court? No, I should be bound by my own belief and should disregard the opinion of the court. Suppose a man should be indicted for killing another. Some circumstances will amount to a justification, such as it being done in defense of his person, and which I consider equally as sacred, in defense of his character and reputation. If I were on the jury and it appeared that the person

indicted had killed the other in defense of his character and reputation, I will not find him guilty of murder, though directed by all the courts in the nation. According to some of the sacred maxims recorded in that book which has been so frequently cited, I would say, "I would have done so too and I cannot believe that to be a crime in another which would be justifiable in myself." I have been a juror and always thought myself authorized to decide on the law in criminal cases and should think I had as much right to dictate to the court what was the law in civil cases, as they had to me in criminal cases. I hope that before gentlemen will undertake to establish the law as they have contended, they will introduce a bill to make juries more submissive to the mandates of the courts.

There is an expression in one of the articles of impeachment, which has been commented on by one of the counsel for the respondent (Mr. Key). It is the word "intemperance." As these articles came solely from my pen, I feel bound to explain the meaning of every word contained therein. The word intemperance, has various significations and may proceed from various causes. It may proceed from gluttony. It may consist in drunkenness or another excess which I am ashamed to mention to this honorable court: or it may consist in a want of temper. This last the article of impeachment has reference to, when it charges the respondent with being guilty of intemperance on the trial of Callender. This is a charge which the friends of the respondent are obliged to acknowledge to be correct. It is admitted that he wants temper.

Upon the subject of the eighth article I will take leave to say a few words. What was the charge given by the respondent to the grand jury at Baltimore? The eloquent gentleman who closed the defense, has compared the scene produced by it, to a brawl or a riot. He told us that there was no law to prohibit it, and the respondent was justifiable in delivering the charge and yet the gentleman with so fertile an imagination as he possesses could liken it to nothing but a brawl or a riot. And is this a proper char-

acter to preside in a court of justice? Is a man who conducts himself in such a manner as to excite in court, sensations similar to those excited by a brawl or a riot, to be continued in the exalted station of a judge of the Supreme Court of the United States? I hope not, sir. The time has been when the sentiments advanced by the judge in his charge would have been denounced as jacobinical and would have come within the pale of the sedition law. Even-handed justice has come home to the respondent, his own precedents condemn him. The charge against John Fries (and which the respondent pronounced to be treason) was an attempt to prejudice the minds of the people against the government and the respondent has been guilty of the same offense. But this conduct has been attempted to be justified on the ground that it has been the practice for parsons to preach politics from the pulpit and judges to pronounce judicial harangues from the bench. If we advert to *Hassell's Precedents*, we shall perceive that Doctor Manwaring was impeached for preaching a political sermon. I trust that the judiciary will be confined to their own province, that of giving correct expositions of the law, and that the quick hand of the government will punish all those who exceed their proper bounds. If I thought it worth while, I would show the impropriety of delivering political charges to grand juries, but that point must be evident and has been conceded on all sides. All the witnesses produced by the respondent have declared that they considered the delivery of political charges as improper.

I must now be permitted to attempt something like a review of the conduct of the judge. Begin with him in May, 1800, when sitting on the trial of Fries, he declared the law with respect to treason: Such treason as a man of plain sense will not find by adverting to the constitution. We next find him in the case of Callender, fixing the doctrine of libels. We see the same spirit pervade the decision of both these cases, we see a determination to convict. Follow him to Annapolis and we find the soul of Yorick infused in the soul of the judge. We find him not indeed the king's



jester, for luckily we have no king; but we find him the jester of the nation, of the law, and of the judiciary. I beg leave here to remark upon the testimony of Mr. Mason with respect to the conversation which took place between him and the judge at Annapolis. If this were a jest it was a bitter and biting one to Callender and so far was the witness from conceiving it to be of that nature, that he never mentioned it to any person until the day preceding this trial. He did not conceive himself justifiable to play with the character of the respondent, however the latter might be disposed to sport with that of others. But we were told that this sort of evidence violated private feelings and that one gentleman ought not to be forced to give evidence of the conversation of another. Thank God, we live in a country in which no man is above the law and where no distinction is made in courts of justice between gentlemen and simplemen. Francis the first did not carry his idea of gentlemen further than has been done in this case. I have understood previous declarations of a party, is legal and proper evidence against him, especially when his declarations are carried into effect. In this case the facts follow the declarations, God hath joined them together and let no man put them asunder.

We have been accused of laying in wait for the respondent, as he has done for his victims, and we have been told in order to accomplish his conviction we have violated the feelings of gentlemen and loosened the bonds of society. Sir, in courts of justice we hear nothing about gentlemen and those remarks will not make us shrink from our duty. We will follow him step by step unto the final consummation of his object. This conduct was unknown to the plain common sense of our ancestors. Follow the accused from the trial of Fries to the case at New Castle and we see one uniform rule of conduct, a determination to bear down all opposition. We are not to take the articles as different, but as one continual act of misconduct. We find the charges supporting each other from the case of Fries, in Philadelphia, to the charge delivered to the grand jury at Balti-

more. We will then trace him from Annapolis as we would another felon and see if his after conduct was not in conformity with his declarations there. Trace him in the stage on his way to Richmond and we find him engaged in a conversation with Triplett, who was a stranger to him and expressing sentiments hostile to Callender. We find him afterwards at Richmond, expressing his regret and apprehensions that Callender would not be taken that court. But the gentleman who spoke last (Mr. Harper) observed, that no credit ought to be given to this because the marshal did not return without Callender. Triplett did not say that the marshal had returned without him, but that the judge told him so. Might not the judge, hearing or fearing that Callender could not be taken, declare that the marshal had returned without him? most indubitably. There is no inconsistency in the testimony of Triplett, and not being contradicted it must be considered as conclusive. From thence follow him into court during the trial of Callender and then trace him to New Castle and Baltimore and we shall find a tissue of facts bearing up and supporting each other. In Pennsylvania we find conduct as was not novel to Lewis and Dallas; but Tilghman and even Rawle declared that they had never seen such a procedure. When I say "even Rawle," I do not mean with disrespect of that gentleman, but he did not hear what the others did. So little attention did he pay to the proceedings on the first day, that he did not hear the expressions of Mr. Lewis, which ought to immortalize him, "That his hand should never be polluted with a prejudicated opinion, especially in a capital case." He did not hear much else that was heard by others; the reason was that he was employed about his official duties. We see the same spirit pervade the conduct of the respondent. We have been told that our sympathy ought to be enlisted not on the side of Fries, but on the side of the judge. He has been represented as an aged patriot of seventy years, as a man who is obliged to employ the few moments in which he is not engaged in performing his judicial duties, in defending himself against a criminal prosecution and

it has been said that we have thirsted for his blood. What, sir, are we about to take away his life? No, Mr. President, we only ask that he should be removed from office, on account of the outrages which he has committed against his country. But he is said to be a man struggling with age and disease, a man worthy of sympathy. So, I must be allowed to feel sympathy for others as well as the judge and cannot refuse it to his victims. A hearty yeoman (as Fries was) struggling with injustice and oppression, disposing of his little property to meet the charges of the prosecution. A yeoman, who, having heard of the stamp act, in a moment of apprehension and violence of temper had resisted what he deemed an oppressive law. This man we behold in a dungeon, listening to the clanking of his own fetters and without one solitary friend to comfort and cheer his drooping spirits. He must have been beloved and esteemed among his neighbors; for the gentleman from Pennsylvania (Mr. Hopkinson) has said that he possessed influence enough to prevent for a long time the execution of a law of the United States. This man, trembling at the terrors of the law and about to be the victim of constructive treason, is as much entitled to our sympathy as any king. He shall have my sympathy and more, he shall have justice. Sir, my sympathy shall flow as much for the victim of injustice, as for his powerful oppressor. Let, however, the character which we have heard of Fries be false and the other despicable, miserable reptile, be as much a wretch as he has been represented to be and which I grant to be correct, yet I trust that this court will not be influenced by extraneous matter. We have been told that Fries was a great rebel and Callender a miserable wretch. Admit this to be the case, does that prove that they were not entitled to justice? The court was a court of law and not of honor and were bound to dispense justice to all with an impartial hand. I bottom myself on the case of Logwood, to show that the chief justice of the United States, although he must have considered Logwood as one of the greatest of criminals, yet he deemed him entitled to the benefit of a fair

and impartial trial. Although there was great reason to suspect his using foul play, that great man who presided at the trial and whose real worth was never known until he was appointed chief justice, said not a word, uttered not a syllable until the jury had found their verdict and an exception was taken to the indictment, and he was obliged to deliver the opinion of the court. He never considered Logwood as entitled to indulgence. He knew that he had been guilty of a most heinous offense, and that he employed every undue means in his power to obtain an acquittal, but the judge shrunk from establishing a precedent, which might be used when no necessity existed for it. This man had a fair trial, and Fries and Callender ought to have had the same, whether guilty or not. The attorney general of Maryland has told us that they had fair trials, because they were guilty and if the jury had found a contrary verdict it would not have been an impartial but a partial verdict, because contrary to right. This is a different conception of an impartial trial than what I have always conceived. I hope the conduct of the judge will be taken altogether and the *quo animo* will be seen to pervade all his acts. It has been asked whether if the respondent (who acknowledged to be a man eminent for his talents) had evil and corrupt intentions, he would not have disguised them, or whether he would have disclosed them. In answer to this I will observe, that let a person be ever so wise, he is not always upon his guard. Men of sense sometimes say and do foolish things like the lengthy argument of the ex-attorney general of the United States, to prove that the Potomac had two sides to it.

In the desultory course which I have persued in the arguing of this case, I must be permitted to notice observations as they occur to me, because I was unfortunate enough to lose my notes and they were only found and brought me this morning by the marshal of the District of Columbia, but I have a precedent for the learned attorney general of Maryland, was equally as desultory as I have been.

The ex-attorney general of the United States, asked

whether it would not be absurd that one set of laws should be in force in the courts of the United States, on one side the Potomac and a different set on the other side. Had the gentleman thought but a moment, he must have known that that was the case and that the act of Congress expressly declares the state laws to be the rule of conduct for the government of the federal courts. What law of the United States provides for hanging a man for murder or treason, or provides for striking a jury? None does exist. No uniform laws exist throughout the courts of the United States, but they vary according to the customs and usages of the states. This was provided for the soundest reason; that the people of the different states had been accustomed to be proceeded against by their own laws and would like them better than a new code. I by no means deny the right of Congress, to pass a general law for the government of the federal courts, but by the law of Congress it is declared, that the state laws shall prevail. An attempt has been made in the court of the debate, to arraign the testimony of John Heath. How is it arraigned. He is a creditable man, has been a member of Congress and is now one of the executive counsel of the state of Virginia. Marshall stated that when he went to the chambers of the judge, he found Heath on his way out, but he does not remember whether Randolph was with him at the time or not, Randolph might have been there before and the conversation between him and the judge have taken place. Heath stated at this bar, that he related the conversation to Mr. Holmes and several others. An attempt has been made to show that he could not have related it to Mr. Holmes on that day, because Holmes left Richmond before Callender was arrested. Heath did not state whether he related it to Mr. Holmes directly. He stated that he told it to several immediately and that he remembers to have told it to Mr. Holmes and the latter states, that it might have been told to him at the September court following. Heath stated that he had related the conversation to Merriwether Jones, who was summoned as a witness, but was prevented by in-

disposition from attending, he would therefore have stated that as true which was not a fact, when he expected that Jones would be here as a witness. If I had been governed by personal considerations, I should long since have closed my remarks, but my duty compelled me to be longer than I wished. I shall, however, endeavor to finish, that this cause may go to a tribunal where it may be decided in the spirit and letter of justice. I feel averse to detain this court any longer, when I am conscious that business of importance claims their attention; but I must be permitted to repeat one argument, that the independence of the judiciary is amply sufficient for the faithful discharge of their duties. If judges are perfect and not to be considered as men, why did the constitution provide for impeaching them? This court was told to guard against the spirit of party and of the mischief that would result from a conviction of the respondent; as the spirit of victorious factions have been adduced, I will say a few words. The present ruling party has been represented as a victorious one and warned not to follow the example of others. What is the subject of the prosecution? To hold up to the judges a warning, to act with uprightness in office and not to lean to any party. If they do their duty and administer justice to every person, they will be free from prosecution. This prosecution will be a solemn memento to them, that justice, although sometimes slow, is always certain to overtake her victims. In the year 1800, when the respondent was sitting on the trial of Fries, was it dreamt that in so short a time he would be called to an account for his conduct? Certainly not. There was not the least expectation of the great change which has taken place in our affairs. This is a clue to the key which unlocks the whole conduct of the respondent. He wished to recommend himself to the president of the United States and supposed that the conduct which he pursued, was most likely to have the desired effect. It is well known that this country was divided by political parties, and that in the year eighteen hundred, the one to which the respondent belonged had the ascendancy. The

respondent then conceived that his conduct would recommend him to the ruling party and procure him promotion. Nay more, he is an ambitious and aspiring man and probably had his eye fixed on the presidency of the United States, to which his talents would have recommended him. Can it be doubted but that if he had been brought forward, he would have obtained as many votes as any other man of the party? The transactions of this day was among the least of all possible events which he supposed could have taken place and he supposed that the rigor he showed would recommend him to the majority of the nation. I have too much respect for the gentleman who then held the executive power to believe that (notwithstanding all his errors) such conduct would have been a recommendation to him.

Mr. President, I have been very desultory in the remarks which I have made, I am convinced that if time had permitted me to have reduced my arguments in some sort of order, shape and form, that I should have been unable to have detained the court so long. In a little time I will dismiss them to their consciences and their God. We demand not that an independent judge shall be removed from office. There are independent judges on the bench, whose dismissal we do not seek. We only ask that a man, who is unworthy of the high judicial station which he fills, should be dismissed from the service of his country at the age of seventy years. A man who has marked his whole character with oppression and been constantly employed in preaching politics and construing treason. The suspicion excited against the judge is enough to render him unfit for office. We have been told that the judge possesses an irritable temper and that allowances ought to be made for the imperfections of human nature. I am the last man in the world, who would condemn the judge on the score of irritability of temper; but if ever I should be exalted to an official station and suffer the infirmities of my nature to carry me beyond the bounds of my duty, let me be stoned to death. It is not for having an irritable temper that we

complain of the judge, but for not governing it in a high judicial station; his age ought to have taught him this or he ought to have resigned. Why does he not follow the example of the chief justice, a man as much superior to him in points of talents, as he is in uprightness of conduct? It becomes the court to say, whether a man who has acted in the manner the respondent has done and possesses the imperfections which it is admitted he possesses, shall be turned loose to repeat his outrages upon the nation, or to stand as a land mark and a warning, that hereafter no talents, no age, no connections, shall protect a man from the justice of this nation. The attention of the nation is drawn to this trial and they are waiting in anxious expectation for the event. If Judge Chase is innocent, let him not be merely acquitted. Let it be an unanimous vote. Let hosannas be sung to his name, and let it be said, "thus shall it be done to the man whom the highest judicial tribunal in the nation delighteth to honor."

On the other hand, if he be guilty, which we contend he is, let a unanimous vote of condemnation be pronounced against him. You are called upon to punish him, that henceforward judges may be deterred from bringing politics into court. I beg the court to pause and consider the consequences that will result from an acquittal. We do not ask that the judge shall be beheaded. Nay, we do not ask that he should be disqualified from holding an office hereafter. The constitution does not require it. We demand, in the name of the people of the United States, that a judge unworthy of office be removed. If he is worthy his counsel ought to be impeached for the defense which they have made. They have not attempted to justify his conduct, and that is sufficient evidence of his unworthiness. In the name of the house of representatives, therefore, I demand justice at the hands of this court, and that the respondent be removed from office.

*Mr. Harper.* I beg leave, Mr. President, to correct the honorable gentleman who has just concluded (Mr. Randolph) with respect to what he has called admissions on our part; and to notice a little the authority which he has read respecting Chief Justice Keelynge. The honorable gentleman has stated that we admitted our client to



be guilty. I disclaim and deny any such admission. Had we made it we should have admitted what is not true. We did indeed admit, that our client has been guilty of some casual indiscretions, such as are common to every man; but we neither did or could admit more.

The honorable gentleman is also incorrect in his manner of stating John Heath's testimony. John Heath did positively swear, that he told the circumstances to Mr. Holmes, within an hour after the conversation in his presence took place between the respondent and the marshal.

The honorable gentleman has also said, that I compared the conduct of my client to a brawl or a riot. This is an utter mistake. I said no such thing—I made no such comparison. I merely adduced the case of a person, who had been engaged in a brawl or a riot, and afterwards came into court to give evidence concerning it, as an instance to show how inaccurate are the accounts given by angry men of transactions, by which their passions have been strongly excited.

As to the authority cited by the honorable gentleman from Hatsell, to show that Sir John Keelynge was a man of worthless character, whose writings are not entitled to credit; it does indeed appear from Hatsell, that Sir John Keelynge, while chief justice of England, was cited to appear before the house of commons, upon charges exhibited against him. But what was the result? The honorable gentleman has omitted to inform us. But had he proceeded to read the next sentence in the book, he would have found that Sir John Keelynge appeared to the summons, made his defense, and was most honorably acquitted. It was a light vague and groundless accusation, which met with the fate that ought ever to attend such accusations, and that I hope will attend the present.

The honorable gentleman has also discovered that the decisions reported by Sir John Keelynge, which were cited by my learned colleague, were star chamber decisions; and he has indulged himself in repeating many of the usual invectives against the star chamber proceedings, and star chamber decisions. But where did he find that these decisions were made in the star chamber? If he had taken the trouble to read the book, which, together with its author, he has so much stigmatized, he would have found that these decisions were made, not in the star chamber, but in the court of King's Bench; which was at that time filled by some of the ablest lawyers that England has ever produced. If he will take the trouble to open the learned work of Hale on the criminal law, of Hale, whom he and his colleagues have so much and so justly extolled, and whose eulogium is a perpetual theme, in every court of criminal jurisdiction; if he will turn to Hawkins, the leading authority and constant manual on criminal law; he will find that Keelynge's Reports are constantly cited as authority by those learned writers; and that the very decisions cited by my learned colleague, which so strongly excited the indignation of the honorable gentleman himself, are, at this moment, considered as the established law of England and consequently of this country so far as they apply.

The latitude allowed by this honorable court, would admit of my correcting many other mistakes of minor importance, into which the honorable gentleman has fallen; but the lateness of the hour and our anxious wish to bring the trial to a close, admonish me to abstain from any further remarks.

*Mr. Randolph.* I did not say that the case cited from Keelynge was a star chamber decision, but that it took place in those times when star chamber decisions were in force. I did not cite Hatsell to show that Chief Justice Keelynge was convicted, merely to prove that an investigation was made into his conduct on account of complaints having reached the house of commons that the rights of jurors had been innovated by him. The gentleman cannot deny this, or it is immaterial whether he does or not, because his denying it will not prevent it from being true. The event in the case of Judge Keelynge showed that the house had received erroneous information; but in the case before the court, I trust the charges have been satisfactorily substantiated. If he is innocent, on us and on the house of representatives be the disgrace of having accused and brought him to this bar. As I before observed, let there be a unanimous vote of acquittal; let hosannas be sung to his name; nay let odium rest on the people of the United States.

#### THE JUDGMENT.

*March 1.*

At half past twelve the COURT took their seats and the VICE-PRESIDENT, having directed the secretary to read the first article of impeachment, observed that the question would be put to each member, on each article separately, as his name occurred in alphabetical order. The first article was then read. The question was thereupon put by the VICE-PRESIDENT and repeated after each article as read, viz.:

Is Samuel Chase, Esq., guilty or not guilty of a high crime or misdemeanor in the article of impeachment just read.

The Senate voted as follows:

Article 1—guilty, 16; not guilty, 18.

Article 2—guilty, 10; not guilty, 24.

Article 3—guilty, 18; not guilty, 16.

Article 4—guilty, 18; not guilty, 16.

Article 5—not guilty, unanimous.

Article 6—guilty, 4; not guilty, 30.

Article 7—guilty, 10; not guilty, 24.

Article 8—guilty, 19; not guilty, 15.

The VICE-PRESIDENT: There not being a constitutional majority on any one article, it becomes my duty to pronounce

that Samuel Chase, Esq., is acquitted on the articles of impeachment exhibited against him by the house of representatives.

Table of the votes given on the several articles of impeachment:

	Art. 1	Art. 2	Art. 3	Art. 4	Art. 5	Art. 6	Art. 7	Art. 8
Mr. Adams ..... Mass.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Anderson ..... Tenn.	g	g	g	g	ng	ng	ng	g
Mr. Baldwin ..... Ga.	g	ng	g	ng	ng	ng	ng	g
Mr. Bayard ..... Del.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Bradley ..... Vt.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Breckenridge ..... Ky.	g	g	g	g	ng	g	g	g
Mr. Brown ..... Ky.	g	ng	g	g	ng	ng	ng	g
Mr. Cooke ..... Tenn.	g	g	g	g	ng	g	g	g
Mr. Condit ..... N. J.	g	g	g	g	ng	ng	ng	g
Mr. Dayton ..... N. J.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Ellery ..... R. I.	g	g	g	g	ng	ng	ng	g
Mr. Franklin ..... N. C.	g	ng	g	g	ng	ng	g	g
Mr. Gaillard ..... S. C.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Giles ..... Va.	ng	g	g	g	ng	ng	ng	g
Mr. Hillhouse ..... Conn.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Howland ..... R. I.	g	g	g	g	ng	g	g	g
Mr. Jackson ..... Ga.	ng	ng	g	g	ng	ng	g	g
Mr. Logan ..... Pa.	g	ng	g	g	ng	ng	ng	g
Mr. Maclay ..... Pa.	g	g	g	g	ng	g	g	g
Mr. Mitchill ..... N. Y.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Moore ..... Va.	g	g	g	g	ng	ng	ng	g
Mr. Olcott ..... N. H.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Pickering ..... Mass.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Plumer ..... N. H.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Israel Smith ..... Vt.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. J. Smith ..... N. Y.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. J. Smith ..... Ohio	ng	ng	ng	ng	ng	ng	ng	ng
Mr. S. Smith ..... Md.	ng	ng	g	g	ng	ng	g	g
Mr. Stone ..... N. C.	g	ng	ng	g	ng	ng	g	g
Mr. Sumpter ..... S. C.	g	g	g	g	ng	ng	g	g
Mr. Tracy ..... Conn.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. White ..... Del.	ng	ng	ng	ng	ng	ng	ng	ng
Mr. Worthington ..... Ohio	g	ng	g	g	ng	ng	ng	g
Mr. Wright ..... Md.	g	ng	g	g	ng	ng	g	g
Guilty . . . . .	16	10	18	18	0	4	10	19
Not Guilty . . . . .	18	24	16	16	34	30	24	15

## THE TRIAL OF JAMES PHILIPS FOR LARCENY, NEW YORK CITY. 1819.

### THE NARRATIVE.

John Branson, who kept a store in New York City, found one night when he came to close his establishment that several hats that he had displayed outside had been stolen. So the next evening to catch the thief he hung one outside the window, attached to a strong cord which he tied to the side of the building. Then he secreted himself behind a pile of goods and watched. His ruse was successful. After a while a man came along and seizing the hat attempted to walk away with it. But when he discovered that it was tied, and saw Branson's eye on him, he dropped it and ran. But he was caught and indicted for stealing the hat. On the trial the judge told the jury that they would have to acquit him, because the law required that to be guilty of larceny there must be what was called an asportation, i. e., a carrying away of the thing, and here that was impossible, for the hat was all the time attached to the building and the cord was never broken.

### THE TRIAL.<sup>1</sup>

*In the Court of General Sessions, New York City, December, 1819.*

HON. CADWALLADER D. COLDEN,<sup>2</sup> *Judge.*

*December 16.*

The prisoner was indicted for larceny for stealing one hat, the property of John Branson on December 10. He pleaded *not guilty*.

*Pierre C. Van Wyck*,<sup>3</sup> District Attorney, for the Prosecution; the *Prisoner* was without counsel.

<sup>1</sup> New York City Hall Recorder. See 1 Am. St. Tr., 61.

<sup>2</sup> See 1 Am. St. Tr. 6.

<sup>3</sup> See 10 Am. St. Tr. 567.

## THE EVIDENCE.

*John Branson.* I am the proprietor of a furnishing store in the city. Several hats that I displayed outside my store were stolen on the evening of December 9, and I determined to catch the thief. So the next evening I put one hat outside which I tied with a strong string to the window, then I went behind a pile of goods at the door and watched. Presently I saw the

prisoner look at the hat, take hold of it and commence to run away with it. But when he tried to pull it away and found that the string cord was too strong and would not break, he took to his heels. But I caught up to him and turned him over to a watchman.

The *prisoner* made no denial of the testimony and called no witnesses.

COLDEN, *Judge*: I must say to you gentlemen of the jury that to constitute larceny, with which the prisoner is charged, there must be a carrying away, and the prisoner must have had a complete control of and possession of the property which he is charged with stealing. I will read you from East's Crown Law a few leading cases which will explain to you what this means.

The least removal of the thing taken from the place where it was before is a sufficient asportation, though it be not quite carried off. As where the prisoner took up a parcel in a wagon, and carried it from one end of the wagon to the other, with intent to steal it; although it was never taken out of the carriage, but he was seized in the fact; yet, by all the judges, this was a sufficient asportation to constitute felony. But where William Cherry was indicted for stealing a wrapper and some pieces of linen cloth; and it appeared that the linen was packed up in the wrapper in the common form of a long square, which was laid lengthwise in a wagon: That the prisoner set up the wrapper on one end in the wagon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose; but was apprehended before he had taken any thing: all the judges agreed that this was no larceny; although his intention to steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they

were; and the felon must, for the instant at least, have the entire and absolute possession of them.

In another case one had his keys tied to the strings of his purse in his pocket, which Elizabeth Wilkinson attempted to take from him, and was detected with the purse in her hand; but the strings of the purse still hung to the owner's pocket by means of the keys. This was ruled to be no asportation: the purse could not be said to be carried away, for it still remained fastened to the place where it was before. So where A had his purse tied to his girdle, and B attempted to rob him, in the struggle the girdle broke, and the purse fell to the ground; B not having previously taken hold of it, nor picking it up afterwards: it was ruled to be no taking.

In the conference upon Cherry's case, above referred to, Eyre B. mentioned a case before him, where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter. A thief took up the goods and carried them towards the door as far as the string would permit, and was then stopped: this he held not to be a severance, and consequently no felony.

James Lapier was convicted of robbing Mrs. Hobart on the highway, and taking from her person a diamond ear-ring. The fact was that as Mrs. H. was coming out of the opera house she felt the prisoner snatch at her ear-ring and tear it from her ear, which bled, and she was much hurt; but the ear-ring fell into her hair; where it was found after she returned home. Judgment being respited for the opinion of the judges, whether this were such a taking from the person as to constitute robbery; they were all of opinion that it was. It being in the possession of the prisoner for a moment, separate from the lady's person, was sufficient, although he could not retain it, but probably lost it again the same instant; and it was taken by violence.

But in the case of Edward Farrel, who, upon an indictment for robbery, was found to have stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him; on which the prosecutor laid the bed on the ground; but before the prisoner could take

it up so as to remove it from the spot where it lay, he was apprehended: the judges were of opinion that the offense was not completed, and the prisoner was discharged.

It is evident from the evidence given by the only witness, that the prisoner never had the possession and control of the hat; it was all the time attached to the building; he did not cut the cord, and did not succeed in breaking it. So in my opinion you cannot find him guilty as charged.

The *Jury* returned a verdict of *not guilty* and the prisoner was discharged.

**THE TRIAL OF MARK AND PHILLIS (NEGRO  
SLAVES) FOR PETIT TREASON, IN THE  
MURDER OF CAPTAIN JOHN CODMAN,  
THEIR MASTER, CAMBRIDGE,  
MASSACHUSETTS, 1755.**

**THE NARRATIVE.**

Captain John Codman, a thrifty saddler, sea captain, and merchant of Charlestown, Mass., was the owner of several slaves whom he employed either as mechanics, common laborers, or house servants. Three of the most trusted of these, Mark, Phillis, and Phebe—particularly Mark—found the rigid discipline of their master unendurable, and, after setting fire to his workshop some six years before, hoping by the destruction of this building to so embarrass him that he would be obliged to sell them, they, in the year 1755, conspired to gain their end by poisoning him.

In this confederacy some five or six negroes belonging to other owners were more or less directly implicated. Mark, the leader, was able to read and write. He professed to have read the Bible through, in order to find if, in any way, his master could be killed without incurring guilt, and had come to the conclusion that according to Scripture no sin would be committed if the act could be accomplished without bloodshed. It seems, moreover, to have been commonly believed by the negroes that a Mr. Salmon had been poisoned by one of his slaves, without discovery of the crime. So, application was made by Mark, first to Kerr, the servant of Dr. John Gibbons, and then to Robin, the servant of Dr. Wm. Clark, for poison from their masters' apothecary stores, which was to be administered by the two women. Essex, the servant of Thomas Powers, had also furnished Mark with a quantity of black lead for the same purpose. This was not the harmless plumbago to which that name is now usually given, but ga-



lena, or plumbub nigrum, a native sulphuret of lead, probably used for a glaze by the potters of Charlestown.

Kerr declined to have any hand in the business, but Robin twice obtained and delivered to Mark a quantity of arsenic, of which the women, Phebe and Phillis, made a solution which they kept secreted in a vial, and from time to time mixed with the water-gruel and sago which they sometimes gave directly to their victim to eat, and at other times prepared to be innocently administered to him by one of his daughters. They also mixed with his food some of the black lead, which Phillis seems to have thought was the efficient poison, though it appeared from the testimony that he was killed by the arsenic.

The crime was promptly traced home to the conspirators, and the day after Captain Codman's death, a coroner's jury found that he died from poison feloniously procured and administered by Mark. Ten days later, Quaco, the nominal husband of Phebe and one of the negroes implicated, was examined before a justice of the peace, and the examination was followed by that of Mark and Phillis. The grand jury found a true bill for petit treason against Phillis, and against Mark and Robin as accessories before the fact.

On the trial, Quaco, Phebe and Robin seem to have been allowed to turn King's evidence, but the answers of the prisoners on their examination were mutually recriminative and amounted to a plenary confession of the crime of each. They were speedily convicted, and a month later Mark was hanged and Phillis burned to death—the latter being the punishment at common law for petit treason committed by a woman.\*

#### THE TRIAL.<sup>1</sup>

*In the Superior Court of Judicature, Court of Assize and General Goal Delivery, Cambridge, Middlesex County, Massachusetts, August, 1755.*

\* This narrative is taken from Mr. Goodell's pamphlet, *post*.

<sup>1</sup> *Bibliography*. \*"The Trial and Execution for Petit Treason of Mark and Phillis, Slaves of Capt. John Codman, who murdered

HON. STEPHEN SEWALL,<sup>2</sup> *Chief Justice.*

BENJAMIN LYNDE,<sup>3</sup>  
JOHN CUSHING,<sup>4</sup>  
CHAMBERS RUSSELL,<sup>5</sup> } *Justices.*

*August 7.*

Upon an indictment found by the grand jury against *Phillis*, a female slave, and *Mark* and *Robin*, male slaves, for petit treason, and for the murder of their master, Captain John Codman, by causing poison to be placed in the water-gruel of which he partook,<sup>5a</sup> today the said *Phillis* was ar-

their Master at Charlestown, Mass., in 1755; for which the man was hanged and gibbeted, and the woman was burned to death. Including also some account of other punishments by burning in Massachusetts. By Abner Cheney Goodell, Jr. Cambridge. John Wilson and Son. University Press. 1883."

Judge Lynde, one of the judges, makes a memorandum of this trial and of the particulars of the executions, in his diary under date of July 9, 1755. *Lynde Diaries* (privately printed, 1880), p. 179.

<sup>2</sup> SEWALL, STEPHEN. (1704-1760.) Born Salem, Mass. Chief Justice of Massachusetts, 1752-1760.

<sup>3</sup> LYNDE, BENJAMIN. (1700-1781.) Born and died Salem, Mass., after being a judge of the Sessions and Common Pleas, he in 1745 succeeded his father on the bench of the Supreme Court.

<sup>4</sup> CUSHING, JOHN. (1695-1778.) Born and lived in Scituate, Mass.; member of the Council, 1746-1763; judge of Probate, Plymouth Co., 1738-1746; a justice of the Court of Common Pleas for Plymouth Co., 1738-1746; in 1747 judge of the Superior Court of Judicature, resigning 1771. See *Davis' Bench and Bar of Mass.*

<sup>5</sup> RUSSELL, CHAMBERS. (1713-1766.) Born Charlestown, Mass.; graduated Harvard, 1731. From 1747 to 1752, judge Court of Common Pleas, Middlesex Co., 1747-1752; member of the Council, 1759-1760; judge of vice-admiralty over New Hampshire, Massachusetts and Rhode Island, 1747. Early in life established himself in Concord and represented that town in the General Court; judge of the Superior Court in 1752-1766. Died in Guilford, England. "One of the few judges up to this time educated in the law." See *Davis' Bench and Bar of Massachusetts.*

<sup>5a</sup> The jurors for the Lord, the King, upon their oath present that *Phillis* a negro woman of Charlestown, in the County of Middlesex, spinster servant of John Codman, late of Charlestown, aforesaid gentleman not having the fear of God before her eyes but of her malice forethought contriving to deprive the said John Codman, her said master, of his life, and him, feloniously and traitorously to kill and murder, she, the said *Phillis* on the thirtieth day

raigned and upon her arraignment pleaded not guilty and for trial put herself upon God and the country, and the said Mark was also arraigned upon this indictment and upon his arraignment pleaded not guilty, and for trial put himself upon God and the country. A jury was thereupon sworn to

of June last, at Charlestown aforesaid, in the dwelling house of the said John, there did of her malice forethought wilfully, feloniously and traitorously put a deadly poison called arsenic into a vial of water and thereby did then and there poison the same water—and that the said Phillis, knowing the water aforesaid to be so poisoned, did then and there feloniously, wilfully, traitorously and of her malice forethought put one spoonful of the same water so poisoned into a pint of the said John's watergruel and thereby poison the same watergruel. And that the said Phillis did then and there of her malice forethought feloniously, wilfully and traitorously in manner as aforesaid poison the watergruel aforesaid, with a felonious and traitorous intent and design that the said John her said master then being should then and there eat the same watergruel so poisoned and thereby be poisoned, killed and murdered. And that one Elizabeth Codman, not knowing the watergruel aforesaid to be so poisoned, then and there innocently gave the same watergruel so poisoned as aforesaid to the said John to eat.

And that the said John then and there being the said Phillis' master and being altogether ignorant of the watergruel aforesaid's being poisoned as aforesaid and suspecting no evil did then and there eat the same watergruel so poisoned as aforesaid. And that the said Phillis then and there was feloniously and traitorously present with the said Elizabeth and John knowing of and consenting unto the said Elizabeth's giving him the said John the watergruel aforesaid so poisoned as aforesaid and his eating the same as aforesaid. And that the said John by means of his eating the watergruel aforesaid so poisoned as aforesaid there languished for the space of fifteen hours and then at Charlestown aforesaid died of the poison aforesaid given him as aforesaid. And so the jurors aforesaid upon their oath say that the said Phillis did at Charlestown aforesaid of her malice aforethought in manner and form aforesaid wilfully, feloniously and traitorously poison, kill and murder the said John Codman, her said master, against the peace of the said Lord, the King, his crown and dignity.

And the jurors aforesaid upon their oath further present that Mark, a negro man of Charleston, aforesaid laborer and servant of the said John Codman. And Robbin, a negro man of Boston, in the County of Suffolk, laborer and servant of John Clark of Boston, aforesaid apothecary, before the said treason and murder aforesaid, committed by the said Phillis in manner and form aforesaid, did at Charleston aforesaid, on the twentieth day of June last, of their malice forethought (the said Mark, then being servant of the said

try the issue, composed of Mr. John Miller, foreman, and his fellows.

*Edmund Trowbridge.*<sup>a</sup> Attorney General, for the Crown.

#### THE EVIDENCE.

There was first read the examination of the prisoner *Phillis*, taken by Attorney General *Trowbridge* and *Thaddeus Mason*<sup>7</sup> on July 26 and August 2, as follows:

*The Attorney General.* Was Mr. John Codman, late of Charlestown, your master? Yes, he was.

How long was you his servant? He, my said master, bought me when I was a little girl and I continued his servant until his death.

Do you know of what sickness your said master died? I suppose he was poisoned.

Do you know he was poisoned? I do know he was poisoned.

What was he poisoned with? It was with that black lead.

What black lead is it you mean? The potter's lead.

How do you know your mas-

ter was poisoned with that lead? Mark got some of the said potter's lead from Essex Powers and my young mistress, Molly, found some of the same lead in the porringer that my master's sago was in, he complained it was gritty; and that made Miss Molly look into the porringer, and finding the lead there, she asked me what it was, I told her I did not know. I cleaned the skillet the sago was boiled in and found some of the same stuff in the bottom of the skillet that was in the bottom of the porringer. And presently after Mark was carried to gaol, Tom brought a paper of the potter's lead out of the blacksmith's shop, which he said he found there; and I saw it and am sure it was the same with that which was in the bottom of the porringer and the skillet.

John Codman) feloniously and traitorously, advise and incite, procure and abet the said *Phillis* to do and commit the said treason and murder aforesaid against the peace of the said Lord, the King, his crown and dignity.

Edm. Trowbridge,  
Attorney and Dom. Registrar.

This is a true bill.

Caleb Dana, Foreman.

<sup>a</sup> TROWBRIDGE, EDMUND. (1709-1792.) Born Newton, Mass.; attorney general 1749-1755, afterwards judge Supreme Court; died in Cambridge, Mass.

<sup>7</sup> MASON, THADDEUS. (1706-1802.) Resided principally in Charlestown, Mass., before the Revolution; afterwards in Cambridge, where he died; graduated Harvard, 1728; for a short time private secretary to Governor Belcher; deputy naval officer, 1731; deputy secretary of the Province, 1734; served as clerk of the Middlesex courts for 54 years; register of deeds, 1781-1784.

Do you know that any other poison besides the potter's lead was given to your master? Yes.

What was it? It was water which was poured out of a vial.

How do you know that, that water was poison? There was a white powder in the vial, which sunk to the bottom of it.

Do you know who put the powder into the vial? I put the first powder in.

Where did you get that powder? Phebe gave it to me up in the garret the sabbath day morning before the last sacrament before my master died, and Phoebe at the same time told me Mark gave it to her.

What was the powder in when Phoebe gave it you? It was in a white paper, folded up square, both ends being turned up and it was tied with some twine.

How much powder was there in the paper? There was a good deal of it. I believe near an ounce.

Did you put all that powder into the vial? No, I put in but a little of it, only so much as lay on the point of a narrow piece of flat iron, with which I put it in, which iron Mark made and gave it to me to give to Phebe. Mark gave me the iron the Saturday before the sabbath. I asked him what it was for, he would not tell me; he said Robbin gave him one, and he had lost it; and that he himself went into the shop and made this. I gave the iron to Phoebe that same afternoon, in the kitchen; and the next morning she gave it to me in the garret, and Quaco was there with her; she whispered to me and told me to take the paper of powder which was in the hollow over the

window, and the flat iron which was with it and put some of it into the vial with the iron which I did; and she bid me put some water into it, but I did not; but she afterwards put some in herself, as she told me, and she put it into the closet in the kitchen in a corner behind a black jug; and the same vial was kept there until my master died.

Had your master any of that water which was put into the said vial given to him? Yes, he had. How was it given to him? It was poured into his barley drink and into his infusion, and into his chocolate, and into his watergruel.

Who poured the water out of the second vial into the chocolate? Phoebe did, and master afterwards eat it.

Who poured it into his barley drink? I did it myself; I poured a drop out of the vial into the barley drink, and I felt ugly, and poured the water out of the mug again off from the barley and put clean water into the mug again and covered it over that it might boil quick.

Who poured the water out of the vial into the infusion? Phoebe did.

How do you know it? I came into the kitchen and saw her do it.

Did your master drink the infusion after that water was so poured in? He drank one tea cup full of it.

How do you know that Phoebe poured any of the poisoned water out of the vial into your master's chocolate? She told me she had done it.

When did she tell you so? That same day.

Was it before or after your

master eat that chocolate that the poisoned water was poured into, that she told you so? Before he eat it.

Did you see him eat that chocolate? Yes, I did, he eat it in the kitchen on a little round table.

Who put the second powder into the vial? Phoebe put it in; I left part of the powder she gave me in the paper, and she afterwards put that into the vial as she told me, as I was in the cellar drawing some cider, I heard Phoebe tell Mark that the powder was all out, and all used up.

When was it that you heard Phoebe tell Mark so? The Wednesday before my master died.

Do you know of any more powder being got to give to your master? Yes, but master never took any of it.

Who got this last powder? Mark got it.

What did he do with it? He gave it to me, in our little house.

What sort of powder was it that Mark gave you? It was white, the same as the first.

What was it in? In a piece of paper; he had more of that powder than he gave me, it was in a paper folded up in a long square, he tore off part of that paper, and put some of the powder into it, and gave it to me and kept the rest himself, and at the same time that he gave it to me he told me that Robbin said we were damned fools we had not given master that first powder at two doses, for it would have killed him, and nobody would have known who hurt him, for it was enough to kill the strongest man living; up-

on which I asked Mark how he knew, it would not have been found out, he said that Mr. Salmon's negroes poisoned him and were never found out, but had got good masters and so might we.

What did you do with that powder which Mark gave you? I put it into the vial and set it in the same place it was in before, there was some of the first powder and water remaining in the vial when I put this last in.

Do you know that any of the water that was in the vial after you put this last powder in was given to your master? No, he never had a drop of it. The next day after master died Mark came into the closet where I was eating my dinner and asked me for that bottle. I asked him what he wanted it for, and he would not tell me, but insisted upon having it, upon which I told him that it was there behind the jug, and he took it and went directly down to the shop in the yard, and I never saw it afterwards until Justice Mason showed it to me, on the fast day night.

Do you know where Mark got that powder which he gave to you? He had it of Robbin, Dr. Clark's negro; that lived with Mr. Vassall.

How do you know that Mark had that powder of Robbin? The Thursday night before my master died Mark told me he was going over to Boston to Robbin to get some more powder for the said Phoebe told him the other was all out; and Mark went over to Boston and returned again about 9 o'clock; and I asked Mark if he had got it, and he told me no, he had not, but Rob-

bin was to bring it over the next night; and between 8 and 9 o'clock that next night, a negro fellow came to me in our yard and asked me for Mark, and I asked him his name but he would not tell me, and I said to him, countryman, if you tell me your name I'll call Mark, for I know where he is, but he would not. I then asked him if he was not Robbin Vassall (for I mistrusted it was he) and upon that he laughed and said his name was not Robbin Vassall, but he came out of the country and wanted to see Mark very much about his child; and upon my refusing to tell him where Mark was the negro went away down to the ferry, and followed him at some distance and saw him go into the ferry boat, and the boat put off with him in it. That same Friday, in the afternoon, Mark told me if any negro fellow should come and say that he came out of the country to call him, I asked him what negro it was that he expected would come; he told me it was Robbin, and that he was to say that he came out of the country to speak with Mark about his child, and bid me tell nobody about it.

Do you know Robbin, Dr. Clark's negro? I do, and have known him for many years.

How then happened it that you could not certainly tell whether the negro that asked for Mark was Robbin or not? Because it was dark; so dark I could not see his face so as certainly to know him, but I am fully satisfied it was Robbin.

What reason have you to be satisfied it was Robbin? That same night I told Mark that a negro fellow had been there and

asked for him and wanted him, he asked me why I did not call him, I told him our folks called me and I could not, Mark told me he was very sorry I did not, and asked me if he gave me anything, I told him he did not, he said he was very sorry he did not; then I asked him who it was and he said it was Robbin, and then he told me that he thought Robbin and he had been playing blind man's buff, for they had been over the ferry twice that night and missed one another; and that Elijah Phipps and Timo Rand told him that a negro fellow had been over the ferry to speak with him about his child. And then Mark told me he would the next night go over to Robbin and get some more of the same powder, and would bring it over on the sabbath day and he went to Boston on the Saturday night, but did not return till Monday morning, when he brought it and gave it to me in the little house, as I told you before.

Did you see Robbin at Charlestown in the time of your master's sickness or about the time of his death? Yes, I saw him on Tuesday the ship was launched, when my master caught Mark buying drink at Mrs. Shearman's to treat him with, and drove him away; and I saw him at Charlestown on the Saturday after my master was buried; but I did not speak with him at either of those times. The Tuesday he was before our shop door, in the street, with Mark and had a bag upon his shoulder, and on the Saturday in the afternoon I saw him going up the street by our house, while Phoebe and I were washing in the back

yard; I told Phoebe there was Robbin a going along this minute, and she said is he? and asked me what clothes he had on; I told her he had a bluish coat on lined with a straw colored or yellow lining and the cuffs open and lined with the said yellow lining, and that he had a black wig on; and I told Phoebe I believed he was gone up to Mark to tell him not to own that he had given anything to him, and Phoebe said she believed so to; and I went into the street to the pump with a pail to get some water, designing to see whether he went that way, and I saw him go right up the main street and I could see him as far up as Mr. Eleazer Phillips', and I did not see him afterwards. I never see him with a wig on before, but as he went by us he looked me full in the face and I knew it was Robbin. When I told Phoebe that Robbin was going by, I thought she saw him, but she questioned whether it was he, and I told her I was sure it was he, for I had known him ever since he was a boy, and I told her I would lay a mug of flip that it was he, but she would not; and then it was that I told her I believed he was gone up to Mark, etc.

Do you know what powder that was which Mark and Phoebe gave you, and you put into the vial? Mark told me it was Ratsbane, but I told Phoebe I believed Mark lied and that it was only burnt alum, for I told her that upon taking Ratsbane they would directly swell, and master did not swell; and she said she believed so to.

How many times was any of that water, which was in the vial,

put into your master's victuals? Not above seven times.

When was the first time? The next Monday morning after Phoebe gave me the first powder, then it was put into his chocolate by Phoebe. The next was also put into his chocolate by Phoebe on the next Wednesday morning, and I thinking she put in more than she should, told her her hand was heavy, and there was no more put in, that I know of till the next Friday when Phoebe put some into his chocolate, and my master eat the chocolate all the three times aforesaid in the kitchen, and I was there and saw him. The next was on the Saturday following, when I put some into his watergruel, but I felt ugly and threw it away, and made some fresh, and did not put any into that. The next was on the afternoon of the same Saturday, I made him some more watergruel and poured some of the water out of the vial into it, and it turned yellow, and Miss Betty asked me what was the matter with the watergruel and I gave her no answer; but that was thrown away, and more fresh made, and Miss Molly was going to put the same plumbs in again, Phoebe told her not to do it, but she had better put in some fresh plumbs, and she did; and no poison was put into that. It was by Phoebe's advice that I put it into the first this afternoon. And he had no more, that I know of till the next Monday night, when Mark put some of the potter's lead into master's sago.

How do you know that Mark put any of the potter's lead into the sago? When I went out of the kitchen I left the sago in the



little iron skillet on the fire, and nobody was in the kitchen then, but when I returned Mark was sitting on a form in the corner, and I afterwards found some of that lead in the skillet, and neither Phoebe nor I had any such lead.

Do you know of any other poison prepared for, or given to your master? No, I do not.

Who was it that first contrived the poisoning of your Master Codman? It was Mark who first contrived it. He told Phoebe and I that he had read the Bible through, and that it was no sin to kill him if they did not lay violent hands on him so as to shed blood, by sticking or stabbing or cutting his throat.

When was it that Mark first proposed the poisoning of his master? Some time last winter; he proposed it to Phoebe and I, but we would not agree to it, and told him no such thing should be done in the house; this before my master brought him home from Boston.

Did he ever afterwards propose the poisoning his master? Yes, he did; a week or a fortnight after my master brought him home from Boston, he proposed it to me first, and I would not agree to it, and then he proposed it to Phoebe.

What reason did Mark give for poisoning his master? He said he was uneasy and wanted to have another master, and he was concerned for Phoebe and I too.

Do you know how your master's work house that was burnt down came on fire? Yes, I do.

How came it on fire? I set it on fire, but it was through

Mark's means, he gave me no rest till I did it.

How did you set your master's work house on fire? I threw a coal of fire into some shavings between the blacksmith's shop and the work house, and I went away and did not see it kindle.

Who put the shavings there? Mark did.

Was anybody concerned in the burning the work house besides Mark and you? Yes, Phoebe knew about it as well as I.

Where was Phoebe and Mark when you put the coal of fire into the shavings? They were up garret in bed.

Who first proposed the setting the work house on fire and what reason was given for doing it? Mark first proposed it to Phoebe and I; and the reason he gave us was that he wanted to get to Boston, and if all was burnt down, he did not know what master could do without selling us.

Why did you when Phoebe poured some of the water out of the vial into the chocolate tell her, "her hands were heavy?" I thought she poured in too much, more than she should. I felt ugly and I wasn't willing she should put in so much and that he should be killed so quick. Mark's orders were to give it in two doses, that was the directions Robbin gave to Mark, as Mark told me, and Mark said Robbin told him there was no more taste in it than in cold water.

Why did you not tell your master or some of the family that Phoebe had poisoned the chocolate, and thereby prevent your master's eating it? I do not know why I did not tell.

There was next read the examination of *Mark*, the pris-

oner, before Attorney General Trowbridge and Thaddeus Mason, on July 26 and August 2.

*The Attorney General.* What is your name? Mark.

Are you a servant or freeman? A servant. Mr. John Codman was my master.

How long was you his servant? For several years before and until his death.

Do you know what occasioned your master's death? He was poisoned.

What was he poisoned with? With poison that came from the doctor's.

What doctor? Dr. Clark that lives at the north end of Boston.

What sort of poison was that? It was a white powder put up in a paper.

How do you know that that powder came from Dr. Clark's? Robbin the negro fellow that belongs to Dr. Clark gave it to me.

When and where did Robbin give you that powder? A week day night, at his master's barn.

Was there any person present with you when Robbin gave you that powder? The first time the negro man his fellow servant called him out, it was in the evening near 9 o'clock.

How many times had you such powder of Robbin? Twice only.

When was the last time you had any such powder of him? The sabbath day night before my master died, in the evening after candle light.

Where was it you had this last powder of him, and what was it in? He gave it to me in the same barn, it was done up in a long square in two papers, the outermost paper was brown and the innermost paper was white, as the other was.

What did Robbin give you these powders for? To kill three pigs belonging to Quaco, as Phoebe told me.

How long ago was it since Robbin gave you the first of these powders? I can't certainly tell.

Was it before Robbin and you were together at John Harris ye potters work house? I think it was before.

How long before was it? About a week before.

Did you pay Robbin anything for these powders? No. I did not.

What did you do with them? Phoebe had the first; and she sent Phillis for the second and I gave it to her.

When and where did you give Phoebe the first paper of that powder? In our garret; the same night I brought it over.

Was anybody there when you gave it to her? No.

What did she do with it? She took it and put it upon the table. Did you give her the whole of the powder you had of Robbin the first time? Yes. I gave her the paper with all the powder in it, as I received it of Robbin.

Did you tell her what was in the paper? No. She knew what was in it; for she told me what to get.

What did she tell you to get? Something to kill three pigs.

Did Robbin give you any directions how to use that powder, and tell you what effect it would have? He told me to put it into about two quarts of swill or Indian meal, and it would make 'em swell up.

Did you tell her how she must use the powder or what effect it

would have? Yes, I told her as Robbin told me.

Do you know whether she used that powder or any part of it? Not otherwise than as Phoebe and Phillis told me since by master's death.

Who did you give the second paper of powder to? To Phillis.

When and where did you give that paper of powder to Phillis? In the little house; she came to empty a pot over the wharf, and I gave it to her, the Monday before my master died, after breakfast in the forenoon.

Did you then give her all the powder you received of Robbin the second time? Yes. I took off the brown paper and gave it to her in the white paper, that it was in, when Robbin gave it to me.

What did she do with it? She carried it into the house to Phoebe as Phillis told me. She came to me and told me Phoebe sent her for that thing that she sent me for, and thereupon I gave Phillis the paper.

How was your master poisoned with these powders? Phoebe and Phillis told me that they used them for that end.

When did they tell you this? The next day after my master died.

Were they together when they told you so? No. Phillis told me of it first, and said that Phoebe used all that I brought first that way; and that the last was used so too by her and Phoebe; and then I went to Phoebe and asked her about it, and she denied it at first but when I told her that Phillis had told me all about it, then she owned it.

Had you no reason before your master died to think that the powders you had of Robbin were given to your master or that he was poisoned therewith? No other reason than hearing Phoebe the Saturday night before master died ask Phillis, if she had given him enough, to which she replied, yes. I have given him enough, and will stick as close to him as his shirts to his back; but who she meant I did not then know, nor until after master died.

Was there no discourse had between you and Phoebe and Phillis about getting more poison, after you had the first of Robbin? The Friday before my master died Phoebe told me that she had lost that stuff that I had brought to her from Robbin, and desired me to get her some more. I told her I would when I went over to Boston; this was in the forenoon, when she was washing in the back yard.

Did you get her any more of Robbin? Yes, and that was it which I gave to Phillis.

When did you go over to get the last poison? On the Saturday night before my master died; I went over after sunset; I went directly to Robbin and told him I wanted some of the same I had of him before, for that was lost, Robbin was then at the corner of his master's house out in the street, he told me he could not get any then, but if I would come on the sabbath day night he would let me have some, and I went to him on the sabbath day night after candle light and he then gave it to me.

Was there anybody with you on the Saturday night when you asked for the poison, or do you

know whether any person saw you and Robbin together that evening? No, nobody was there, and I don't know that anybody saw us together that evening.

How long was you with Robbin at Mr. Harris' work house? I made no tarry there, but left him at the pot house and he and the young man that was with him followed me and overtook me a little below Mr. Waite's slaughter house. And they went with me into the lane leading from the market place to the long wharf near Mrs. Shearman's while I went into Mrs. Shearman's and got a mug of toddy, in the mug I brought from Mr. Harris' work house, and I carried it to them and they both drank with me.

Had you any discourse with Robbin in private or between you and him alone that day? No, none at all.

Where did you drink the toddy? In the lane.

Where did you all go after you drank the toddy? We all came away together and went through Mr. Sprague's yard and so through Mrs. Silence Harris' yard and entry into the street, and they went directly down to the ferry and I went into my master's yard with the pots I brought from the potters work house.

Did you then go with them to the ferry or nearer to it than your master's house? No, I did not.

Did Robbin give you, or did you give Robbin anything between the time of your coming out of Mr. Harris' entry and his going over the ferry? No, I did not give him anything, neither did he give me anything.

After you had parted with him when you came through the entry, did you call him back? No, I did not.

Did your master that day forbid Mrs. Shearman's letting you have any more drink? Yes, my master told her not to sell any drink to any of his servants.

Did Robbin know of it? Not that I know of; he see master go into Mrs. Shearman's shop and passed by Robbin in the lane as Robbin told me.

Did you ever apply to anybody else, besides Robbin for poison? No, only to Carr, Dr. Gibbon's negro man, and then Phoebe sent me for it. She had been with Carr before on the same account, and he told her he could not get her any then, as she told me.

Did you get any poison of Carr? No, he told me he would not let me have any, until he had seen Quaco and did not know whether he should then or not, and I never went to him afterwards.

Did you never ask Dr. Rand's Cato for any poison? No, I do not know that I ever did in the world.

Had you and Phoebe any conversation together about your master in or near your blacksmith's shop or in the yard the Monday before your master died? I had not that I know of.

Did you that day before Tom or any other of your master's servants say that you knew that your master would die or utter any words to that effect? No, I did not. The day before master died, Phoebe came into the shop to dress Tom's eye and got to dancing and mocking master and shaking herself and acting as

master did in the bed. And Tom said he did not care, he hoped he would never get up again for his eye's sake, and Scipio was there at the same time and saw her.

Did you ever say that your master had been offered 400 pounds for you but would not take it, and now he should not have a farthing, or words to that effect? No, I never said any such thing.

Did you ever tell Phoebe or Phillis that the week before your master died, that you went over the ferry to see Robbin to get some more poison, and that he came over the ferry in another boat and so you missed each other and that he, Robbin, pretended to the ferryman that he was a country negro and wanted to see you about your child, or words to that effect? I never told them or either of them so.

How came that vial buried near your forge in the blacksmith's shop, that you told Mr. Kettel of, and he found there? I buried it there.

When did you bury it there? In the afternoon of that day that master died.

Where did you get that vial? I took it from Phillis that same afternoon.

Did anybody see you take it from her? No. When I took it from Phillis she owned that Phoebe had given the first poison that I brought to master; and that she and Phoebe had given him all the rest saving what was then in the bottle, and thereupon I went to Phoebe and charged her with it, she at first denied it, but at last owned it and begged me to say nothing about it; I told her if I had known she

would have put it to that use I would not have got it for her; then I called Pompey to go down to the shop with me for I wanted to speak with him, intending to show him the vial, and he came into the shop but before I had an opportunity to speak to him Mr. Kettell took me.

Where was the vial when you talked with Phoebe as aforesaid? I had it in my pocket and told her so, then I went into the shop and buried it, then I went into the house immediately to call Pompey to show it to him.

Why did you bury the vial before you called Pompey, or show it to anybody? I buried it because I did not want anybody should see it before I showed it to him.

Have you lately had any potters' powdered lead by you in your possession? Only that I had from Essex Powars; which was as I suppose ground to powder.

When did you get that powdered lead of Essex? I had it of him that day I went there for six butter pots, which my master's son Isaac sent me for.

What did you get that lead for? To see if it would melt in our fire, upon a dispute between Tom and I about it; Tom said it would melt, and I told him I did not believe it would; I carried it home and laid it upon the wall plate in the blacksmith's shop, and I never moved it afterwards or thought anything about it till it was showed to me by the Justice.

Do you know that any part of that lead you had of Essex or any lead like unto it was given to your master or put into his victuals or drink? I do not.

Do you know of any proposal made of poisoning your master? No, I do not, nor ever heard any such thing proposed by anybody.

Do you know of any cushoe nuts being procured for that purpose? No; I have not seen a cushoe nut since I have been in this country.

Do you know of any copperas or green stuff being provided for that purpose? No, I do not.

What time on the Saturday before your master died was it that you heard Phoebe ask Phillis if she had given him enough, and Phillis said she had, and would stick as close to him as his shirt to his back? In the afternoon about dark; and before I went to Boston.

How came you, after you had heard this talk between Phoebe and Phillis to get her, Phoebe, more poison? I did not know what she meant by their talk, nor who they meant by him.

Did you tell Karr that Phoebe sent you for that poison you applied to him for? She did not tell me it was poison, but told me to ask Karr for that thing he had promised her; he said he knew what it was and would not send it till he had talked to Quaco, and did not know that he should send it afterwards; and I said no more to Karr about it.

Did you ever ask Karr at any other time for poison? No.

Did you never ask him for

something to poison or kill a dog? No, not that I know of.

Was you ever bit by a dog? No, I never was.

Do you know anything more of your master's being poisoned than you have before related? No, I do not.

Quaco (a negro) on his examination says that he is a slave belonging to Mr. James Dalton, of Boston, victualler; that some time the last winter one Kerr, a negro man, belonging to Dr. Gibbons, told him that Mark, belonging to Mr. Codman, had been with him to get some poison and that Kerr told him that Mark asked Kerr whether Phebe had been with him for poison. Quaco says that he spoke to Phebe, Mr. Codman's negro woman, whom he called his wife and told her not to be concerned with Mark, for that she would be brought into trouble by him, for that Mark had been with Kerr Gibbons to get poison and had asked Kerr whether Phebe had not been with him for poison. Quaco also says that this discourse with Phebe was when they were going to bed the Saturday night after the discourse had with Kerr Gibbons. He charged her not to be concerned with Mark about poison on any account whatever.

Phebe and Robin were admitted as King's evidence and gave evidence incriminating both prisoners.

## THE VERDICT AND SENTENCE.

The *Jury* having fully heard the evidence went out to consider thereof and returned with their verdicts and upon their oaths said that the said *Phillis* is *guilty*, and that the said

*Mark is guilty*, upon which the prisoners were remanded, and being again brought and set to the bar, the *King's Attorney* moved the Court that judgment of death might be given against them, whereupon they were asked by the CHIEF JUSTICE if they had ought to say why judgment of death should not be given against them, and having nothing material to offer, judgment of death was pronounced against them by the CHIEF JUSTICE in the name of the court in form following, that is to say that the said Phillis go from hence to the place where she came from, and from thence be drawn to the place of execution and there be burnt to death, and that the said Mark go from hence to the place where he came from, and from thence be drawn to the place of execution and there be hanged by the neck until he be dead, and God Almighty have mercy upon their souls, and that these sentences be put into execution upon Thursday, the eighteenth day of September next, between the hours of one and five of the clock in the afternoon.

#### THE EXECUTION.

*September 18.*

Phillis and Mark were executed today at the usual place of execution in Cambridge. The following account is taken from the *Boston Evening Post*, of September 22:

"Thursday last in the afternoon, Mark, a negro man, and Phillis, a negro woman, both servants to the late Capt. John Codman, of Charlestown, were executed at Cambridge, for poisoning their said master, as mentioned in this paper some weeks ago. The fellow was hanged and the woman burned at a stake about ten yards distant from the gallows. They both confessed themselves guilty of the crime for which they suffered, acknowledged the justice of their sentence and died very penitent. After execution, the body of Mark was brought down to Charlestown common and hanged in chains on a gibbet erected there for that purpose."

Frothingham, in his "History of Charlestown," quotes this item from the *Post*, and adds, from Dr. Josiah Bartlett's account of Charlestown, that "the place where Mark was suspended in irons was on the northerly side of Cambridge road,

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about one-fourth of a mile above our peninsula." He also adds, from the same authority, that "Phebe, who was the most culpable," became evidence against the others, and was transported to the West India.



**THE TRIAL OF HENRIETTA ROBINSON FOR  
THE MURDER OF TIMOTHY LANAGAN,  
TROY, N. Y., 1854.**

**THE NARRATIVE.**

Timothy Lanagan kept a small grocery store in Troy, New York. It was a building of one story divided into two compartments in one of which he carried on business and in the other his family, consisting of a wife and four children, resided. Lanagan was an uneducated man, an Irishman, and in humble circumstances, but he bore an honest and reputable character. His place was the habitual resort of his countrymen who inhabited that quarter of the town. He sometimes furnished them with a cheap entertainment in the way of music and dancing.

In the spring of 1853, Catherine Lube, aged 25 years, a sister of his brother's wife, became a member of the Lanagan family. She had been in service in Albany, but at the time had sought a temporary abode in his house, until a situation could be obtained. She was an humble, modest and inoffensive girl at enmity with none, having but a few relatives in the country, and from early youth had led a toilsome and unobtrusive life.

Early in the morning of the 25th of May, 1853, Henrietta Robinson,\* who lived across the street, entered the grocery,

\* According to her biographer, Wilson, Henrietta Robinson's maiden name was Charlotte Wood and she was born in the city of Quebec in 1827. Her family, in respectability, standing and influence was among the first in the ancient capital of Canada. In her youth she was endowed with surpassing beauty. She was graceful, kind to everyone and intelligent beyond her years. Those who knew her described her as of medium height, with coal-black hair, dark blue eyes, a fair complexion and very white teeth; proud by nature, erect and of perfect symmetry. Her haughty spirit, however, could brook no restraint. Once aroused, the most frightful and fiery passion raged within her breast. Up to the age of sixteen

where she had been accustomed to deal, and had been in the habit of purchasing provisions, beer and brandy, and bought a quart of beer. Some two hours after she sent her gardener over to borrow two dollars and immediately followed him demanding the cause of the delay. At eleven o'clock she again

she remained at her home and her training and association had been of the most refined character.

In 1843, accompanied by her younger sister, she attended the celebrated Willard female seminary at Troy, New York. She remained there two years where she conducted herself with prudence and modesty, and excelled in her studies which she prosecuted assiduously and became proficient in drawing, painting and music. While at the seminary she met an estimable young man, whose position however did not meet the ambition of her parents and she was removed from the institution and returned again to Quebec. A little later she suffered a young scion of English nobility to lead her to the altar, the marriage being celebrated on the 16th December, 1846. Shortly thereafter she went with her husband to England. There she became the mother of two children and late in 1849 secretly departed for America, and finally returned home to be turned away and driven from the house with the admonition never to return. In 1850 she took up her residence in Troy and lived apart from society, never entered the streets except under cover of darkness or closely veiled and assumed the name of Mrs. Henrietta Robinson. She moved to Albany in 1851. There she exhibited those singular manifestations of monomania, traceable throughout her subsequent career. Later she moved back to Troy the scene of this tragedy. She died at the Matteawan State Hospital on May 14th, 1905.

But that much of this is mere fiction seems very probable. In the Associated Press dispatches printed in the American newspapers on May 15th, 1905, appeared this telegram:

Chicago, Ill.—The veil of mystery which for more than half a century has hidden the identity of the "veiled murderess" has been lifted by the hand of Mrs. Charlotte P. Norris, 1426 Newport avenue, Chicago. The so-called "veiled murderess" was a classmate of Mrs. Norris at the famous Emma Willard school at Troy, N. Y., sixty years ago. The maiden name of the woman, who was a puzzle to the authorities ever since her arrest for murder in 1853, was Charlotte Wood. She married an Englishman of rank, Sir Wm. F. Elliott, but ran away from his home in England two years after the marriage, and returned to America to find the house of her father, a wealthy merchant in Quebec, shut against her. Afterwards she went to live in Troy.

This called forth the following letter published in the Toronto Globe a few days later from the Canadian historian, Morgan.

To the Editor of The Globe: Many years ago there lived in the

made her appearance announcing to Mrs. Lanagan that she had received a telegram informing her that her husband had been injured by the cars. She passed through the grocery into the back room where several loungers had assembled, and she became engaged with them in a loud and angry conversation. Mrs. Lanagan finally induced her to retire. At one o'clock in the afternoon she again returned and found Lan-

city of Quebec a gentleman named Robert Wood. At the time of his marriage with Miss Charlotte Gray of the same city, October, 1817, he held the office of inspector of timber, but subsequently entering into partnership with his father-in-law, Froet Gray, he became with him a lumber merchant. Mr. Wood died at Savannah, Ga., April 10, 1847. His widow survived him but a few months, dying of typhus fever in her native city, July, the same year. By their union there was issue three daughters, who were long famous among the many beautiful and accomplished women belonging to the ancient capital. Georgiana, the eldest daughter, married at Quebec, May, 1839, William Capel Clayton, ensign and lieutenant, the Coldstream Guards (one battalion of which famous corps was then stationed at Quebec); Emma Cecilia, the second daughter, married in the same city, November, 1838, Alexander Anthony Macnichol, captain 1st Royals: Charlotte Maria, the third daughter, married in Montreal, January 16, 1846, William Francis Augustus Elliott, ensign 93rd Highlanders, eldest son of William Francis Elliott, to which family our late Governor-General, Lord Minto, also belonged. On his father's death, in 1864, Mr. Wood's son-in-law succeeded to the title and family estates, his wife, who had lived with him throughout, sharing in these honors. She died at Stobs Castle, November 29, 1878, and is, I believe buried there. Sir William, who, according to Burke, was a Fellow of the Royal Society, and therefore a man of note in the scientific as well as in the social world, married, secondly, 1878, Hannah Grissell, widow of Henry Kellsall, and daughter of H. T. Birkett, Esq., of Foxbury, Surrey. I mention these facts, in detail, to show how highly improbable—nay, untruthful—is the story telegraphed to all the newspapers that the woman who has lately died there, and who was known to her friends as the "veiled murderess," could have been, as claimed, Lady Elliott, the Charlottle Wood of other days. Nor was she, according to the authorities consulted, in any way related to the deceased baronet. As all the persons mentioned herein have now passed away, it becomes all the more important that there should be no delay in correcting the misstatements made in the premises.

Henry J. Morgan,

Editor "Types of Canadian Men and Women,"  
483 Bank Street, Ottawa, May 17.

agan, his wife and Catherine Lubee at dinner. Accepting their invitation she sat down with them and proposed to repay their kindness by treating them to beer at her expense. Two tumblers were accordingly filled. Mrs. Robinson then asked for some white sugar which was supplied her in a saucer. She walked across the room a number of times and then put the sugar into the tumblers of beer and invited those present to drink. Timothy Lanagan and the girl drank. Mrs. Robinson excused herself with the remark that "she didn't feel like taking any at present." Two hours afterwards Lanagan and Catherine Lubee were seized with mortal sickness and both died within twenty-four hours, from arsenic poisoning.

A few months previous at a dance at Lanagan's, Mrs. Robinson had a quarrel with a man, drew a pistol and was put out of the house by Mrs. Lanagan. A few days later she came back and abused Mrs. Lanagan and did not resume her visits to the grocery for some time.

She was indicted for the murder of Timothy Lanagan. It was proved that on May 10th she had purchased arsenic at a drug store and that a quantity of it was found at her house, where she lived alone, concealed under the carpet in one of the rooms. The defense was insanity, but the jury found her guilty and she was sentenced to death. But the governor commuted the sentence to imprisonment for life. She died in May, 1905, at the New York State Hospital for the Insane, at the age of 89.

### THE TRIAL.<sup>1</sup>

*In the Court of Oyer and Terminer of Rennselaer County,  
Troy, New York, May, 1854.*

HON. IRA HARRIS,<sup>2</sup> *Presiding Judge.*<sup>3</sup>

*October 10, 1853.*

*Henrietta Robinson*, charged with the murder of Timothy Lanagan, was arraigned today, one term of court having

<sup>1</sup> *Bibliography.* \*"Henrietta Robinson. 'Her early years were full of promise. Beauty was hers, and intellect, and all the aids which fortune, family and friends could give, . . . But she

passed after her arrest without proceeding with her trial. She entered the court room well attired, but so closely veiled that no one was able to catch a glimpse of her features. The indictment having been read, she pleaded *not guilty*.

The *District Attorney* moved that additional jurors be drawn and summoned. The *Counsel for the Prisoner* objected on the ground that she was so deranged that they had been unable until recently to converse with her so as to be prepared to conduct her defense. After listening to arguments and reading affidavits, the COURT granted the request and remanded her back to prison.

February 21, 1854.

Mr. Hogeboom, who appeared for the Attorney General, said that he had advised in the case of Henrietta Robinson the procurement of a new indictment on account of that al-

was "crossed in love," and thence her life to headlong ruin tended.' By D. Wilson. New York and Auburn. Miller, Orton & Mulligan. New York: 25 Park Row—Auburn: 107 Genesee street. 1855." The frontispiece is a good steel plate of the murderess.

\* Parker's Criminal Reports. See 4 Am. St. Tr. 88.

<sup>2</sup> HARRIS, IRA. (1802-1875.) Born Charleston, Montgomery Co., N. Y. When six years old his parents removed from Charleston to Preble, N. Y., where his father became one of the extensive land-owners in Courtland Co. Prepared for college at Homer Academy, and graduated Union College, 1824. Entered office of Augustus Donnelly, Homer, N. Y., where he remained one year and then went to Albany, N. Y., where he continued his legal studies under Ambrose Spencer. Called to the Bar 1827 and opened an office in Albany; formed partnership with Salem Dutcher, one of his associates in college, which continued until 1842 when it was dissolved by the removal of Mr. Dutcher to New York City. His next law partner was Julius Rhodes. Elected to represent Albany County in the Assembly, 1844, and 1845; delegate to Constitutional Convention, 1846; member State Senate, 1846; Justice Supreme Court, 1847-1859; elected to Senate of the United States, 1861, his opponents to this distinguished position being Horace Greeley and W. M. Evarts; member Constitutional Convention, 1867; was connected with the Albany Law School from its organization in 1850 and lectured there whenever his official duties permitted, and was afterwards Professor of Equity, Jurisprudence and Practice, devoting himself wholly to the school to the time of his death. President of the Board of Trustees of Union College; one of the founders of Rochester University and its first and only chancellor.

<sup>3</sup> With him sat Sessions Justices Burdick and Newberry.

ready found being defective. The case was accordingly postponed until the next term.

*May 22.*

A new indictment having been found by the grand jury, charging the prisoner with the murder of Timothy Lanagan by administering arsenic to him in a glass of beer on May 25, 1853, in the city of Troy, she was again arraigned and pleaded *not guilty*.

Anson Bingham,<sup>4</sup> District Attorney; Henry Hogeboom,<sup>5</sup> and George Van Santvoord,<sup>6</sup> for the People.

<sup>4</sup> BINGHAM, ANSON. District Attorney, Troy, 1854. Removed to Albany, 1857. Author of *Law of Real Property*, Albany, 1868; *Law of Descents*, Albany, 1870; *Law of Executory Contracts*, Albany, 1872; *Rents, Real and Personal Covenants and Conditions*, Albany, 1857. See Allibone Critical Dict. of English Literature and British and American Authors, supplement, v. 1.

<sup>5</sup> HOGEBOOM, HENRY. (1809-1872.) Born Claverack, Columbia Co., N. Y. Graduated Yale, 1827. Studied law with brother-in-law, Abraham VanBuren, and Powers E. Day, Catskill, N. Y., and Campbell Bushnell, Hudson, N. Y. Admitted to Bar, 1830; began practice in Hudson; master of chancery and county judge, Columbia Co., 1831-1834; partnership with Abraham VanBuren, 1834-1836; subsequent partners, Joseph D. Monell, Casper R. Collier, William A. Porter (his nephew), William Bois and P. Bonesteel; judge Common Pleas, Columbia Co., 1836; member State Legislature, 1839; judge State Supreme Court, 1851-1872. His charges to juries were noteworthy. LL. D. Rutgers College, 1870. Died Hudson, N. Y. See Appleton's *Cyclopaedia American Biog.*, 1915; *Biographical Review of Columbia Co.*, 1994; *Obituary Record of Graduates of Yale*, 1872.

<sup>6</sup> VAN SANTVOORD, GEORGE. (1819-1863.) Born Belleville, N. J. Educated Academy, Kinderhook, N. Y.; graduated Union Coll. (M. A.) 1841; studied law in Kinderhook in office of Vanderpoel & Tobey, at same time having charge of English department in Kinderhook Academy. Admitted to Bar, 1844; removed same year to Lafayette, Ind.; returned, 1846, to Kinderhook; practiced law there from 1846 to 1852; in 1852 removed to Troy, forming partnership with Hon. David L. Seymour, continuing until 1859 when formed one with Benjamin H. Hall, of Troy, which lasted until his death. Member New York State Assembly, 1852-1856; district attorney, Rensselaer County, 1860-1863. Killed in railroad accident, dying at East Albany, N. Y. Member of Phi Beta Kappa. Author of: *Lives of the French Revolutionists*; *The Indiana Justice* (Lafayette, 1845); *Life of Algernon Sidney* (N. Y., 1851); *Principles of Pleading in Civil Actions, Under New*

*Job Pierson,*<sup>7</sup> *William A. Beach,*<sup>8</sup> *Martin I. Townsend,*<sup>9</sup> *A. B. Olin,*<sup>10</sup> and *Samuel Storer*, for the Prisoner.

*Mrs. Robinson* took a seat near her counsel, inside the bar. Her face was covered with a heavy blue veil. She was attired in black, wearing a finely worked collar and undersleeves, a white bonnet, ornamented with artificial flowers, overhung with the veil, white kid gloves, and a rich black mantilla lined with white satin. She at first manifested considerable uneasiness, but in a short time assumed an air of the utmost composure, remaining in her seat, motionless as a veiled statue.

The *Clerk* proceeded to empanel the jury. John Cline, the first called. Asked if he had formed an opinion in regard to the case, replied that he had heard nothing of it except through the newspapers, and had not formed or expressed an opinion. He had no conscientious scruples against hanging, adding, "life for life is Scripture, and that is what I go for." He was sworn. Some thirty jurors were examined as to whether they had formed an opinion or entertained conscientious scruples in regard to the death penalty. Twelve proved to be entirely unprejudiced, having formed no opinion in the case, and entertaining similar sentiments with Mr. Cline upon the subject of punishment. They took their seats in the jury box and were sworn.

#### MR. BINGHAM'S OPENING.

*Mr. Bingham:* Gentlemen, the prisoner at the bar, Henrietta Robinson, has been heretofore arraigned, charged with the murder of Timothy Lanagan, in this city, on the 25th day of May, 1853. She is now here for trial. The crime of murder is well understood. It has but one meaning. It is not necessary, at this time, to read its definition from the statute.

York Code (1852-1854); Lives of the Chief Justices of the United States (1854); Precedents of Pleading (1858); Practice in Supreme Court of New York in Equity Actions, Albany (N. Y., 1860-1862). See Appleton's Cyc. (1915); Lamb's Biog. Dict. (1903); Union Coll. Cent. Cat. (1795-1895) 1895; Memorial to George Van Vantvoord (Albany, 1863).

<sup>7</sup>PIERSON, JOB. Born in New York State. Attended common schools; graduated Williams Coll., 1811. Elected to 22nd and 23rd Congresses (1831-1835); surrogate Rensselaer Co., 1835; director of Troy City Bank, 1833. Died Troy, N. Y., 1860. See Biog. Cong. Direct. (1774-1911) 1913; Gen. Cat. Williams Coll., 1910; A. J. Weise's "History City of Troy," 1876.

<sup>8</sup>BEACH, WILLIAM AUGUSTUS. (1809-1884.) Born Saratoga Springs, N. Y. Attended Partridge's Military School, Norwich, Vt.; studied law with uncle, Judge Warren; admitted to Bar, 1833;

I only purpose at present to give you an outline of the facts as they will be established in the course of the testimony we shall produce.

It will appear that the prisoner, on the 25th of May last, resided in the extreme north part of the city, and had resided there previously, a year or more, keeping house. What her

began practice in native town; district attorney Saratoga Co., 1840. Removed to Troy (1855), continuing in practice until 1870 when he settled in New York City. Established firm of Beach & Brown and became one of the leading criminal lawyers of New York. Was counsel for Col. North in his trial by court martial during Civil War; defended Judge Barnard in trial for impeachment; associated in trial of E. S. Stokes for murder and in Vanderbilt will case; leading counsel for plaintiff in Albany Bridge case; secured acquittal of Canal Commissioner Dorn in impeachment trial; associated with James T. Brady in defense of General Cole charged with murder of Hiscock. Died Tarrytown, N. Y. See Appleton's *Cyclopaedia*; Lamb's *Biog. Dict.*, 1900; A. J. Weise's "Troy's One Hundred Years," 1891.

<sup>9</sup> TOWNSEND, MARTIN INGHAM. (1810-1903.) Born Hancock, Mass. Removed to Williamstown, Mass. Attended common schools; graduated Williams Coll. (A. B.), 1833. Read law in office of David Dudley Field, New York City. Removed to Troy, 1833; entered office of Henry Z. Haynor, where he continued study of law. Admitted to Bar, 1836 (Troy, N. Y.); began practice in Troy in partnership with brother, R. W. Townsend; district attorney, Rensselaer Co., 1842-1845; director Troy Union Railroad Co., 1851; delegate to State Constitutional Convention, 1867-1868; chairman New York Republican Convention, Philadelphia, 1872; elected (New York) to 44th and 45th Congresses (1875-1879); United States district attorney northern dist. New York, 1879-1887; member State Constitutional Convention, 1890; regent Univ. of State, New York, 1873-1903. Died Troy, N. Y. While district attorney for Rensselaer Co. secured the conviction of Henry G. Green and Henry Miller for murder; defended the only two slaves who in Rensselaer Co. appealed to courts for protection, securing freedom for both. Employed by U. S. government to attend and report trial of Cadet Whitaker, New York City, trial lasting two years and resulting in Whitaker's acquittal; acted in defense in noted cases of Henrietta Robinson, Andrus Hall, Whitbeck and George E. Gordon. See Weise's (A. J.), "Hist. City of Troy," 1876; *Biog. Cong. Direct.* (1774-1911) 1913; Appleton's *Cyc.*, 1915; Lamb's *Biog. Dict.*, 1903; National *Cyc. Am. Biog.*, 1897; General Cat. Williams Coll., 1910; *Hist. Rensselaer Co.* (N. B. Sylvester), 1880; *Landmarks of Rensselaer Co.* (G. B. Anderson), 1897.

<sup>10</sup> OLIN, ABRAM BALDWIN. (1812-1879.) Born Shaftsbury, Vt. Graduated Williams Coll., 1879. Admitted to Bar (Troy, N. Y.),



antecedents have been, it is not necessary to inquire, nor do we know. On the opposite side of the street from her house resided Timothy Lanagan. He occupied a small dwelling, using part of it for his family, and part for a grocery, and had been residing there from the previous October.

The prisoner and the deceased had no personal acquaintance until the latter moved there. Some two months after this event, the prisoner became a frequenter of his grocery, purchasing there her provisions. Previous to the time we allege the murder was committed, a trouble arose between them in this manner: she attended a dance at Lanagan's house, and during the evening got into a wrangle with a man, or several of them, in the course of which she drew a pistol upon them. Upon this she was put out of doors by Mr. and Mrs. Lanagan, and taken to her home. Two or three days afterward she called at Lanagan's house, quite early in the morning, before Lanagan himself was up, and abused Mrs. Lanagan violently. Some time elapsed before she resumed her visits to the grocery, but when she did it was to purchase articles as usual, and they became apparently on good terms.

On the 25th of May, 1853, very early, she called at the grocery in the absence of Mr. Lanagan, and purchased a pound of crackers and a quart of beer. In an hour or two afterward she returned and requested the loan of two dollars. The money Mrs. Lanagan did not have. The same forenoon she returned again to the house, while several men were there, before whom she conducted herself with such impropriety that Mrs. Lanagan requested her to leave—to go away. She did go but returned about one o'clock. The family consisted of Mr. Lanagan, his wife, and a young woman at the time

1838. Recorder for Troy for three years. Elected to 35th, 36th, 37th Congresses (1857-1863); judge Supreme Court, District of Columbia, 1863-1878. Died Washington, D. C. LL. D. Williams Coll., 1865; Union College, N. Y. See Appleton's Cyc. History Bench and Bar of New York, 1897 (Vol. 1); Biog. Cong. Directory (1774-1911) 1913. See Lamb's Biog. Dict., 1900; Centennial Hist. Washington, D. C., 1892; Gen. Cat. Williams Coll., 1910; A. J. Weise's "Troy's One Hundred Years" (1789-1889) 1891; A. J. Weise's "History of Troy," 1876.

visiting there, named Catherine Lube. These three persons were at dinner. Mrs. Robinson took a seat at the table, and partook of some of the food. While seated at the table, Lanagan left the back room for the grocery, which was in front, leaving the three women about the table. After they had completed their dinner Mrs. Robinson said, "We must have some beer." The two others declined, but she pressed the proposition, saying, "You must have some on my account." She also requested that they should have some sugar in it. Mrs. Lanagan left the room to procure what the prisoner had called for, and soon returned with sugar in a saucer, and a quart of beer. Upon returning, she found Mrs. Robinson walking the floor, and having a white paper in her fingers. She noticed the paper more particularly from the fact of her wanting to borrow two dollars in the forenoon, and she looked at it to see if it was not a bank bill. Mrs. Lanagan then poured the beer into the tumblers, but they were not full. Mrs. Robinson insisted that they should be filled. Mrs. Lanagan, upon this, left the room for more beer, and when she returned she found that the prisoner had poured the sugar from the saucer into the tumblers, and also found a slight powder on the surface of their contents.

Just at this time Lanagan, who was in the grocery all this while, called for his wife to come there; she went, and Mr. Lanagan, the deceased, came into the room where Mrs. Robinson and Miss Lube were. She then stirred the beer in the tumblers, and invited Lanagan and Miss Lube to drink, and both of them did drink. Mrs. Robinson thereupon left the premises. Lanagan also left, to come down into the city. He soon returned to his house very ill; physicians were sent for, and he died at seven o'clock that evening, and we shall show, we think, beyond a question, that he died from the effects of arsenic, and that the accused administered the fatal poison.

We shall also show you, gentlemen, that previous to this transaction, on the 10th of May, the prisoner purchased arsenic at one of the drug stores, and that a quantity of the article was found at her house concealed beneath the carpet; that soon after administering the poison, she left her house,

came to Ostrom's drug store, and told them she was charged with poisoning Timothy Lanagan, and that from fumbling round the glasses she had put something in the beer. She was soon after arrested in the streets, charged with the act. It will be our duty, gentlemen, to show, beyond a reasonable doubt, that she did administer the poison, and that she is responsible for the crime of willful murder, of which she stands indicted. Of the nature of the defense I am not informed.

May 23.

#### THE WITNESSES FOR THE PEOPLE.

*Dr. Henry Adams.* Reside in Troy; knew Timothy Lanagan, was his family physician; was called to see him about 3 o'clock and remained with him until he died, about 6:30. Dr. Skilton came there after me and remained also until his death. His house was a small, one-story building, not painted; two rooms on the first floor—one, fronting on River street, was used as a grocery, the other in rear was used for family purposes. He died in a back room; know Mrs. Robinson.

*Mr. Hogeboom* asked the court if it would not be proper for the prisoner to remove her veil. It was necessary, he remarked; otherwise they would be unable to prove her identity.

JUDGE HARRIS supposed there would be no objection.

(It was removed by the prisoner for a single instant, and then replaced.)

*Dr. Adams.* That is the lady; knew her some months previous; she lived on River street, nearly opposite Lanagan's. On arriving at Lanagan's, found him vomiting, supposed he had taken poison. He complained of pain in the stomach and bowels and a burning in the throat; my belief

is that he died from the effects of some poisonous substance; could not tell by the symptoms, the nature of the poison, they corresponded with the effects of arsenic; was not present at the post-mortem.

Lanagan's symptoms were very violent; was apprehensive from the first the case would terminate fatally. He told me he thought he should not recover, but did not ask me what I thought. His expression was, "The villain has destroyed me, and I shall not recover."

*To Mr. Beach.* I gave him hopes—told him I thought he ought not to despair—that he might recover; was then applying remedies for his relief, but none of them relieved his pain; there were intervals when he did not have so much pain. His decease was sudden. He helped himself in and out of bed, until half an hour of his death, and conversed until a few minutes of it; do not remember a minister was sent for, before he died his mother knelt down and prayed. Mr. Lanagan was an Irishman.

*Re-direct examination.* Dr. Skilton also expressed the opinion that he would not recov-

er; continued of that opinion throughout; saw the case a very aggravated one, the symptoms very violent. It was previous to his saying "the villain had destroyed him," I told him he ought not to despair. When I told him he might recover, did not believe he would. He did not refer to the "villain," more than once. The precise expression was, "A villain has destroyed me." Had a conversation with him regarding the origin of his illness, previous to his statement that he could not recover.

*Mr. Hogeboom.* We propose to prove by Dr. Adams the dying declarations of Lanagan, who could, under the circumstances, have no motive to tell anything but the truth. I consider it a case where such declarations are allowable in evidence.

**THE COURT.** The evidence cannot be received. If these physicians had informed Lanagan he must die, that there was no chance for his recovery, it would have been different. On the contrary, they informed him he might recover. On these grounds the evidence must be excluded.

*To Mr. Beach.* The intense pain at the stomach, the burning sensations in the throat, constant retching, severe evacuations, cramps and prostration are peculiar symptoms caused by poison and they comprise about all the symptoms; constant retching and burning sensations in throat is not common to other diseases. The burning sensation is not peculiar to any variety of poison. In cases of suspected poison it is customary to analyze the stomach to satisfy as to the cause of death, without that, in my opinion, the cause cannot be certainly ascer-

tained; have attended cases of cholera; there is irritation in the throat and thirst; the recovery of the patient depends much upon the strength of the constitution. Severe retching, sudden prostration, cramps, etc., are characteristic of cholera. Without an analysis of the stomach, would not give a definite opinion that Lanagan died by poison, the contents of the stomach were analyzed; have attended his family four or five years. He was a man of vigorous constitution, regular and temperate in his habits.

*To Mr. Hogeboom.* Mr. Lanagan, ordinarily, was able to attend to his own affairs; used to meet him or see him about every week. He was thirty-five years of age. The symptoms he exhibited were not those of cholera; he did not die of cholera; have a decided opinion as to the cause of his death, independent of an analysis; it is such as I have named.

*To Mr. Beach.* Cannot positively state the cause of his death. My opinions were formed partly from the statements of the family, but I arrived at a satisfactory conclusion aside from those statements. Judging from the symptoms alone, my belief is that they were produced by poison; no sure reliance can be placed on external symptoms, and as a usual thing, the stomach is analyzed; do not know I have ever heard or read of a case of poisoning in which analysis was not had.

*Dr. Avery J. Skilton.* Am a practicing physician in this city; Saw Timothy Lanagan the day he died at his house about 5 o'clock. A number of people

were there. He was in the back room; his appearance was somewhat livid, his pulse very feeble; was rolling and writhing on the bed, indicating intense pain; constantly retching and vomiting; complained of severe pain in the stomach and throat; believed then Lanagan had been taking mineral poison; believe it now; speak with confidence on the subject; had little hopes of his recovery; recollect his saying once that he could not live, but he did not state anything as to the cause of his illness; was present when he died, and also at the post mortem. That showed the stomach highly inflamed in patches, in some parts more than others. No chemical tests were applied then to prove the presence of poison. The appearance of the stomach corresponded with the opinion formed as to the cause of death. There was found in the lower part of the stomach a white powder, in the intestines was a greater quantity of mucus than usual, mingled with mineral substances. The external appearance of the polar or larger intestine was singularly blanched. The white powder was enveloped in mucus. Arsenic is a white powder and looks like flour; have no doubt as to the cause of Lanagan's death; fully believe the poison administered in his case was arsenic. The symptoms he exhibited are so sure as to leave the physician no chance to doubt; do not admit that I could be mistaken. Beck's Medical Jurisprudence asserts that it is not safe, in case of poison, to come to a determination until chemical tests are applied to the matter found in the stomach; by a single examination, I

can, satisfactorily to myself, determine whether death is caused by mineral poison. The most prominent medical authors, on this subject, are Guy, Christison, Beck and Orfelia. The reason Beck took the position he did was he considered jurors were not physicians. There is more certainty when the chemical test is applied; am not certain there was a chemical analysis. At the post mortem the stomach, etc., were taken out and given to Dr. Bontecou. No symptom of vegetable poison came under my observation.

*Dr. William P. Seymour.* Am a practicing physician in Troy; did not see Timothy Lanagan the day of his death, but was present at the post mortem which Dr. Bontecou and myself made the day after he died. Dr. Skilton was also present. The stomach evinced all the evidence of severe and acute inflammation, and contained a small quantity of fluid; discovered the presence of a white powder distributed in the lower part of the stomach; can say nothing as to its specific weight; considered the yellow appearance in the intestines a mere discoloration. The whole stomach was highly inflamed, so much so as to cause death. It exhibited the effects of an irritating poison, but whether vegetable or mineral, will not attempt to say. There is no doubt in my mind from that examination, that Lanagan died from poison. Dr. Bontecou took charge of the stomach, etc., and placed it in a clean jar. In another jar was the stomach of a woman said to have been poisoned at the same time. The inflammation was not necessarily produced by poison,

but I have no doubt it was. There was no other evidence of disease except the inflammation. The powder was entangled in a thick mucus; do not think there was a teaspoon full visible.

*Mrs. Ann Lanagan.* Timothy Lanagan was my husband; we had resided corner of River and Rensselaer streets from the previous October. He died on 25th of May, 1853; two months after going to that place became acquainted with Mrs. Robinson. She lived across the street; saw her the first time on 25th May about 6 in the morning in our grocery. She called for a quart of strong beer and a pound of soda crackers, which I furnished her, and she took her leave. At this time my husband was not out of bed.

Saw her again in the grocery that morning about 8. An old man, Haley, who lived with her, was there when she came in. She had sent him over for the loan of two dollars. She asked the old man what kept him so long. I answered, I had delayed him; that I had no money in the house, and that I thought I would send and see if I could not borrow it. She asked, was I so scarce of money, and I said yes. She said she was sorry, and that tomorrow she would lend me a hundred dollars. She then went away.

About eleven, she came into the grocery and told me she was in great trouble; had a telegraph dispatch that Robinson was hurt on the cars. A man stood by, who told her not to fret; that he had a wife out west, and if she was dead he wouldn't fret about it. She walked into the kitchen. There was a lot of men sitting

inside there. Soon after there was loud talking; could hear Mrs. Robinson's voice above the rest, but did not understand what was said; went to her, and advised her to go home; told her that it was no place for her to be, among such a lot of men. After a while she left.

Again, about one, she came through the grocery into the kitchen, where my husband, Catherine Lubea and myself were at dinner. Catherine was stopping with me at that time, having come from Albany on a visit. Mrs. Robinson said, as she walked in, "Are you at dinner?" I said, "Yes." There was an egg on the table, and pointing toward it, she asked, "Whose egg is that?" My husband replied, "It was hers if she wanted it." She took the egg into her hand, and my husband arose and went into the grocery. She then sat down by the table and ate the egg, and I peeled a potato for her. She said Catherine and I must have a glass of beer from her; told her I did not want any; that I was tired of beer, and would not take it. Catherine said she did not like beer. She then asked me if I had any sugar in the house; said we had, but that I thought she did not need any, as she had got nine pounds during the week. She said she did not want to take it home, but wanted it to put in the beer to make it good; took a saucer and went into the store and got some white, powdered sugar, then brought in some beer in a quart measure and poured it into two glasses. When I came back, Mrs. Robinson was walking back and forth across the floor with the saucer in her hand; did not have

enough beer to fill both glasses, and Mrs. Robinson said she should have them full. I went out into the grocery for more, and when I returned she was putting the sugar into the tumblers and I poured in the remainder of the beer. As I took my glass, the other having been placed before Catherine, noticed a little foam on the surface of the beer and thought it was some dust from the sugar; took a teaspoon in my hand to skim it off, but she took the spoon out of my hand, and said, "Don't you do so; that is the best part of it." My husband called me, and I went into the grocery, leaving my beer untasted on the table. My husband then went into the kitchen, saying he wanted to go down town as far as Morrison's; turned round and saw he had taken my glass of beer in his hand, and was just putting it to his lips. Nothing further was said, and Mrs. Robinson left immediately; did not see where the other glass of beer was, when my husband stood with his in his hand.

Do not know as to Catherine Lube's drinking, any further than she told me. Mrs. Robinson did not drink herself. When she was eating the egg and potato, observed a white paper in her hand. As she passed out through the grocery, had no conversation with her, and she said nothing to me. After she left, and before leaving to go to Morrison & Lord's, my husband stopped to make some charges. I stepped into the kitchen and saw the glasses standing on the table empty. In a few minutes Catherine came to the door, and asked Mr. Lanagan

how he felt after taking that glass of beer, to which he made answer that he did not seem to feel very comfortable.

Cannot state the precise time my husband left for Morrison & Lord's, but he came back at 3. After he left, Mrs. Robinson again came into the grocery. Catherine, at this time, was lying on the bed in the kitchen. Mrs. Robinson asked her how she felt. She replied, very poorly; and repeatedly said prisoner had put something in the beer that sickened her. Mrs. Robinson answered, she had put nothing in it but what would do her good; do not recollect any more that passed between them. Mrs. Robinson then came to the counter, and called for a glass of beer; told her I thought she did not need any. She then turned round to a man who was there, and asked him if he would have a glass with her, but he refused.

At this time my husband came in and laid down on the sofa. He was very bad, hardly able to speak; asked him if he was sick. He replied, run for the doctor; I am done for. I turned round to Mrs. Robinson, who was standing near, and said: "What have you done? you have killed the father of my children." She answered, "No—I have done no such thing." She then attempted to go over and speak to him, but I put my hand against her, and told her to go away. Lanagan's mother presently came in, and helped me put her out of doors. As she attempted to approach my husband, while he was lying on the sofa, he put up both his hands, and said, "Go, woman, go." Soon after she left, I received a message from her to go

over to her house. The old man, Haley, brought it, saying it was from Mrs. Robinson; told him I should not go. She did not come back after she was put out of doors; did not see her afterward.

*Mr. Hogeboom.* Do you see her now? (Shrouded in her long veil, as the prisoner was; the witness was unable to reply. An attempt was here made to induce her to remove it, but failed. She only drew it the closer around her, and utterly refused.)

*Mr. Pierson.* I must state that her veiling is entirely beyond our control; there are reasons, other than a repugnance to be the object of observation during this trial, why she desired to conceal herself. Those reasons the court knows nothing about, but the counsel understands them.

*Mr. Hogeboom.* We do not intend to be tenacious in the matter.

*Mrs. Lanagan.* After Mrs. Robinson left the grocery, my husband became so ill, we had to take him in our arms and lay him in the bed. Catherine had left the house and gone to James Lanagan's, where she died. He was our first cousin, and lived not far from our house.

Was crying; my husband told me not to grieve; I must make the best of it, now that he "was done for." Before the doctors came he said he thought he could not get well. He died at a quarter to seven that evening, and Catherine Lubee died at five the next morning. A French clergyman was sent for by Mr. Lanagan's mother, and was with him before his death.

*Mr. Hogeboom* offered to prove the dying declarations of Lana-

gan. The COURT. I do not think it will answer.

Recollect a disturbance at our house, in which Mrs. Robinson was concerned, on the occasion of a dance. I told her to go home. This was two months before his death.

*Mr. Hogeboom.* What had Mrs. Robinson done at the dance that made you tell her to go home. The prisoner's counsel objected.

JUDGE HARRIS. It is proper to show any unkindness of feeling, even at this time. The question may be answered.

*Mrs. Lanagan.* I told her so, because a young man asked her to dance. She refused; did not hear what was said, but she drew her pistol, saying she had been insulted, and threatened to blow his brains out. My husband came, and said he would not have such a noise, and that she must leave; went to her and told her to go home, and went with her to her own door, advising her that if she would keep in her own place nobody would molest her. Later she came to the door of the grocery again; asked if Smith was there; Smith went out, and I heard nothing further of them.

Two mornings after the dance Mrs. Robinson came to the grocery and abused me very much; said I was a mean woman, and kept rowdies in my house to insult her; that she would have us turned out of the place and would not let us get any license to sell; told her I wanted no trouble with her; to go home, but she kept talking, and my husband got out of bed and told Mrs. Robinson he would not have such a noise, and she must



leave the house. She said she would not leave the house for him, and asked if he wanted to turn so good a customer as she was out of doors. He said he did not want her custom, but wanted her to leave. She said she would not leave, and that if he wanted to turn her out, he would have to get a constable to do it. In a few minutes she left. The sugar, I got out of a small box where it is usually kept. The box and sugar that remained were taken in charge by the coroner. Previous to drinking the beer, my husband was in good health. The beer was of the same kind and quality we were retailing at the store daily.

*Cross-examined.* First saw Mrs. Robinson at our grocery, about two months after we moved into the place; she came to trade with us. We were on good terms with her until the morning she came in to abuse us; the dance was in the spring; have had none since that time; Smith was the only strange person there. The rest were my friends. We had music. Have occasionally visited her, and so have my children. After the dance, was on good terms with Mrs. Robinson. She stayed away some time, but came back again; did not feel unfriendly toward her, when I told her to go home, neither did she manifest any unkindness toward me. She was at our grocery nearly every day until the occurrence at the dance, when she remained away about three weeks. She always paid her bills when requested; owed us fourteen dollars at the time of my husband's decease; was in the habit of borrowing money of us, but always returned it

again. On the morning she sent the old man for the loan of two dollars, had the money, but did not want to let her have it; am not in the habit of lying, but told Mrs. Robinson I did not have the money; did not want to refuse her, neither did I want to let her have it. Old man Haley told me he couldn't imagine what she wanted the money for, because she had everything in the house that anybody could want. At the coroner's inquest I said there was no cause of enmity between my husband and myself and Mrs. Robinson; said nothing about the difficulty at the ball.

When she called for the beer, and Miss Lubee and myself said we did not wish any, she declared she would not leave the house until she had it; never had any arsenic in our house, nor had I ever seen any; was just about to drink the beer when my husband called me; did not drink a glass of brandy and water, nor did I say, that having become tired of beer I would take some brandy. Miss Lubee had been at our house seven or eight days. She was twenty-five years of age, unmarried, and resided in Albany. She stopped during the day with me and went to Mr. James Lanagan's at night, as I had no bed for her. Mrs. Robinson knew Miss Lubee; became acquainted with her at our place, and they were on friendly terms. The box from which I got the sugar was open, and stood inside the counter, but within the reach of any one.

Mrs. Robinson was invited to partake of the beer by Miss Lubee, but said she didn't feel like taking any. If Mrs. Robinson drank of the beer, and was aft-

erwards sick and vomited, did not know of it; do not recollect that Haley, when he brought me the message to go over to her house, said she was sick. The paper which Mrs. Robinson had in her hands was white, and she held it between her fingers; was not with Catherine when she died. The names of the men with whom Mrs. Robinson had the angry talk in the back room, in the forenoon of the day my husband died, were William Buckley, Pat Gaven and others; do not know what they were doing.

*William H. Ostrom.* Am a druggist and reside in Troy. My store was south of the residence of Mrs. Robinson; knew a Mrs. Robinson and should now know whether that was her, if she would raise her veil.

*Mr. Hogeboom.* I submit, your honor, we shall have to try that veil experiment once more.

The COURT. If the prisoner prefers it, she may step forward to where the witness is, and unveil herself to him alone.

(*Mrs. Robinson* arose, walked rapidly toward the witness, ascended the platform, and placing her face close to that of the witness, drew aside her veil, but only for an instant.)

*Mr. Ostrom.* That is the lady, sir. She was in my store several times in May, 1853, and purchased arsenic there; between the 10th and 25th of the month the amount she purchased was two ounces. She was at my store half an hour previous to her arrest. She was very much excited; said she was in trouble; that she had been charged with poisoning a couple of persons, mentioning Lanagan's name; said

she supposed it was out of revenge, because she would not lend them a hundred dollars; that she did not want to draw that amount of money out of the bank in the absence of Mr. Robinson; declared she was very much in fear of the neighborhood, and requested my advice as to what she should do to be protected; referred her to the chief of police, and informed her that it was his duty to send a posse of officers to protect her, if necessary. She had a revolver with her. I probed it with the handle of a pen, and found one barrel loaded. There were three or four percussion caps, but the lock was so rusty I doubt if it could be fired; think the cap was good on the barrels loaded; the one I probed was in good order.

About ten on the Saturday evening previous to the arrest, she was at my store, and had her pistol with her.

The 25th she said she had gone over to the grocery in search of her gardener; she was drinking beer with Mrs. Lanagan and others; that there was some confusion in handling the tumblers, and that Mr. Lanagan was taken sick, and they had accused her of putting poison into the beer.

*Cross-examined.* She did not voluntarily give me the pistol. I requested it. She said she wanted the arsenic to kill rats; that she was living in the vicinity of Boutwell's mills, where they were abundant. This was voluntary while I was putting up the article; she purchased it within two or three days of 10th of May. Within an hour after purchasing it, she called again, and appeared to be very much excited; never noticed anything

peculiar in her appearance except on this occasion, and when she called the evening of her arrest. This last time she seemed fearful and restless. She looked around her, apprehensively, and did not appear like the same woman, either in dress or manner; was very nervous, and was not in one position any length of time, but walking about, all over the store; had noticed in her former visits that she had the air and appearance of an accomplished lady. On the evening of the 25th, her dress was in disorder, and her language more bold. Only on one occasion previous had I noticed this change, and that was on the Saturday evening when I saw a revolver, or the muzzle of one, in her dress.

*To Mr. Hogeboom.* On this Saturday evening, from her flushed countenance and excited manner, have no doubt she was laboring under the effects of liquor; cannot say she was in liquor on the 25th, because there were other reasons which might have caused her excitement. The arsenic I sold her was rolled up in two white papers, and both were labeled "poison."

*To Mr. Beach.* On the Saturday her language was not as polished, not as good, as formerly. She made use, however, of no vulgarity. The excited state of her mind, and the flush in her

face, might have been produced by other causes than liquor; might undoubtedly have proceeded from a deranged mind, connected with a diseased state; have no particular knowledge of the symptoms occasioned, in mind or body, by mental excitement, not superinduced by liquor.

*To the Judge.* At the time she returned to the store, after purchasing the arsenic, noticed she was flushed in the face. She was of florid complexion.

*Dr. Skilton* (recalled). Saw Catherine Lube at James Lanagan's some twenty minutes after I first saw Lanagan and again immediately after Lanagan's death. Her symptoms indicated she had taken mineral poison. They were similar to those of Mr. Lanagan, but differed in degree; was present at her post mortem; it exhibited the same as the other—death from mineral poison. No chemical tests were applied; have no doubt she died from mineral poison, and that the poison was arsenic. It is not the general custom of physicians to analyze the contents of the stomach. It is their custom to do it when ordered to; have had some familiarity with cases of poisoning. The coroner generally orders the stomach analyzed in cases of murder; do not remember an instance where it was not so ordered.

*May 24.*

JUDGE HARRIS. Before this trial proceeds further, I have a word or two to say. We have thus far proceeded in this case, with the prisoner masked. The singular spectacle is here presented of a person on trial, charged with a high capital crime, whose face neither the court nor jury have ever seen. I admit it is a matter of ceremony; nevertheless, it is the form prescribed by law, in cases of this character, that the jury shall look upon the prisoner,

and the prisoner upon the jury. It is repugnant to my feelings to try a person under these circumstances. It does not appear to me to be proper; and, therefore, however much I regret the necessity, I feel it to be my duty to require of the prisoner that during the remainder of this trial she sit unveiled.

*Mrs. Robinson.* I am here, your Honor, to undergo a most painful trial—not to be gazed at.

*JUDGE HARRIS.* It may be a hardship, but it is not one for which the court is responsible. I shall use no coercion, Mrs. Robinson, but unless your veil is now removed, so that the jury can see your face, I shall regard you as refusing compliance with a just and reasonable demand of the court.

*Mr. Beach.* We have advised, your Honor, with the prisoner, and earnestly urged and entreated her to comply with the suggestions of the court; her reply to us is, that rather than sit unveiled, she would choose to incur any hazard, however great, and endure all possible consequences. The court, therefore, will perceive that her counsel are powerless in the matter.

(The prisoner continued to sit veiled. There was a slight pause—a dead silence for a minute or two—during which time all eyes were turned toward the masked figure, when the JUDGE ordered the counsel to proceed.)

*Charles Burns.* I arrested Mrs. Robinson at a cabinet shop next door to Clark's drug store, near the Mansion House, between six and seven the day the offense was committed; she asked me if I was a police officer, and I told her I was; conducted her to the jail. On the way we laughed and joked, but said nothing in relation to the murder; visited her house afterward in company with Officer Bowman, Dr. Bontecou and Nathan Camp; found no person on the premises; she having given me the key, searched the house and found, under the corner of the carpet, done up in a piece of white paper, a quantity of arsenic. It was found close to the wall, near the head of a bed, in the middle room, and was taken in charge by the coroner, Dr. Bontecou. The carpet was tacked down.

Found on her person a couple of revolvers, which were also

taken charge of by the coroner. Two barrels of one of them were loaded. She refused to deliver them, and Mr. Price, the sheriff, George Kennedy, and myself, took them away from her at the jail; found in her pocket a small piece of white wrapping paper; there was nothing in it, and I threw it away.

*Cross-examined.* Did not observe what she was doing in the cabinet shop at the time of her arrest. We walked to the jail. She excused herself for appearing in the dress she wore, as it was a muddy, rainy day. We talked somewhat lightly. She inquired if I was going to take her to the recorder's office; and I replied, yes.

The carpet was nailed down over the paper of arsenic we found at her house. There was a paper of Spanish flies, a box of jewelry, a watch, and a locket also found there. The pistols we

took from her at the jail looked pretty rough. She carried them in her bosom, and resisted giving them up.

*Mr. Beach.* The prisoner is anxious to know what has become of that locket. I have not seen it, nor the key to the house, since I delivered them to Dr. Bontecou.

On the way to the prison I pointed to the jail and told her that was the place; suppose she thought it was the courthouse. There was a party of boys standing on the corner, and she asked me to let her walk up the hill a little way, while I should stand on the steps; allowed her to do so. Her object was to avoid being seen entering the jail with me. She walked on as far as the first brick house, then immediately returned and passed into the hall of the jail. She seemed quite surprised when she found where she was.

*To Mr. Van Santvoord.* When I went into the cabinet shop, I said "Good day" to her, and that was all I said before she inquired if I was a police officer. I do not know how long she has resided in the city and never saw her until that day.

*Burr Lord.* Am one of the firm of Morrison & Lord, grocery and provision dealers; knew Timothy Lanagan. The last time I saw him was at our store, 25th of May last. He was there twice on that day; the first time about nine o'clock in the morning and the second time, between one and two o'clock in the afternoon. The last time he remained but a few minutes, saying he was sick, very sick, but did not state the nature of his illness. His face had a

deathly appearance. His eyes looked bad, and his lips were blue and livid. He left the store and went toward home.

*Dr. Reed P. Bontecou.* Am a physician, and during 1853, was coroner of the county of Rensselaer.

Held an inquest over the body of Timothy Lanagan on the evening of his death. The following day made a post mortem of the body at his house in the presence of the jury, Drs. Skilton and Seymour and other persons; was associated with Professor Daikin in making an analysis of the stomach. During the latter part of May and first of June, by the application of chemical tests, we found poison in the stomach, several different tests proved it to be arsenic; found forty grains in the intestines, which had passed through the stomach, a sufficient quantity to produce death; can state professionally that he died of arsenic.

Took charge of a box of sugar from Mrs. Lanagan; was fine, white sugar, which stood on one of the shelves in the store, behind the counter. Saw no other box of sugar there. Mrs. Lanagan said it was all there was in the house. It contained three or four pounds. I kept it in my possession until the time of the analysis, when Professor Daikin and myself tested it for arsenic. There was none in it. The sugar contained no foreign ingredients whatever. Professor Daikin is a professional chemist; I am not.

Tested the beer at Lanagan's by drinking it. It produced no unpleasant effect. There was no poison in the beer. Mrs. Lanagan drew it from the only barrel

there, and some of the coroner's jury, and others, drank of it.

Had never seen Mrs. Robinson previous to this transaction. She resided in a cottage with white pillars, nearly opposite Lanagan's. We found arsenic there in the southeast corner, under the carpet between the bed and the south wall. It was wrapped up in a paper, somewhat soiled, and as near white as may be. It had been fumbled, and was not done up regular, in apothecary style. There was one drachm—about sixty grains—of the arsenic; took possession of it, tested and found it to be arsenic, the same package that is now here in court.

On 25th of May saw Catherine Lubea at the house of James Lanagan about 9 in the evening; took the coroner's jury there to take her evidence. She was sworn on Lanagan's inquest; took her evidence in writing. She was lying in bed at the time and appeared ill—sick at the stomach. She vomited and called for water; do not remember that she complained of a burning sensation in the throat. My opinion at the time, judging from what she told me and not

alone from appearances, was that she had been poisoned; examined the stomach of Miss Lubea, after death, in company with Professor Daikin, and found in it arsenic, of sufficient quantity to produce death; do not know that, at the time I saw her, she had hopes of recovery; told her she would recover and thought so at the time; but the prevailing impression about the room seemed to be that she would not. She replied that she was very sick. Did not change my opinion before I left and communicated no different opinion to her from the one I first expressed; held an inquest over her body on the morning of 26th May. The post-mortem was made before that of Lanagan. The arsenic found in the stomachs of both these individuals was of the same kind I found under the carpet, in the house of Mrs. Robinson.

*Cross-examined.* The tests spoken of were conducted principally by Professor Daikin. Mrs. Robinson was not in attendance at either of the coroner's inquests; first saw her in prison on the evening of the 25th; conversed with her in the jail.

THE COURT. It has been already intimated, in the progress of the trial, that aberration of mind was to be relied upon in the defense. I regret the necessity of alluding to the subject again; but if such is to be a part of the defense, the prisoner must unveil her face, so that it can be seen. The countenance, oftentimes, indicates more truly than anything else, the state of the mind. If the prisoner now refuses to remove the veil, it will be my duty, however painful it may be, to order the sheriff to do it by force. I trust that will not become necessary.

(She raised her veil, but still concealed her face from observation by her fan.)

THE JUDGE. The position of the prisoner must be such that her

face can be seen by the court and jury, and this request shall be complied with.

(After much hesitation, she finally withdrew her fan, exposing her face to the jury, and appeared in a smiling mood. Her countenance was visible only to those directly in front of her, and to the jury at her side. She remained, however, in this position but a short time, before she again partially drew the veil over her face.)

*Dr. Bontscou.* Have seen many individuals who were insane and pretend to be capable of judging of a person's sanity. At the jail the evening of the 25th she was much excited; she was not rational. There was a strange, wild, unnatural appearance of the eye. She laughed and her answers to questions were not pertinent. She was attired in a Jenny Lind sort of short gown, a loose dress and the upper part not attached to the skirt below. Her person, however, was not exposed. Took from her her keys and went to the house where she had resided; found the arsenic as before stated and by the side of the arsenic, under the carpet, a box of jewelry—a watch and chain, a locket, breast pins, cuff pins, earrings and many articles of that description. Next saw her in the jail the day following. The state of her mind was the same as the previous evening. She appeared strange and unnatural; did not consider her rational. Her answers to my questions were unsatisfactory, was unable to obtain the information I desired. My business was to consult her in relation to her furniture; remarked, a wildness in her eyes. In her gesticulations I discovered nothing peculiar. Saw her frequently during the fortnight subsequent to the arrest, was in the habit of visiting the jail two or three times a

week, and was always impressed with the idea she was not sane. Told her once I heard Lanagan and Miss Lubee were dead. She took no notice and as far as I could judge, did not know what I meant. During the second or third week I charged her with poisoning those persons. My expression was: "You know you poisoned those people, and I want you to tell me all about it." She made no answer, but went on chattering away with the same incoherent jumble. She did not, I think, comprehend what I was saying; am satisfied she was not a rational woman.

*To Mr. Hogeboom.* My visits to Mrs. Robinson, at the jail, extended through two or three weeks; was not employed to attend her; have never been paid for my visits; saw her previous to the evening of her arrest. Have been called upon to see insane persons and those supposed to be insane, and to testify in regard to their sanity, but never have been called upon to treat them medically; have never had a patient in my charge for the treatment of insanity. My residence has been constantly in this city, with the exception of a year, during which time I was in Brazil, South America.

Have been called upon to inspect some twenty or thirty cases of persons supposed to be insane. They were not charged with crime, nor were they in hos-

pitals, but they were cases occurring in private practice; have been called upon to testify before a judge, in order to obtain for them admission into the lunatic asylum. Am thirty years of age.

On my first visit to her at the jail told her I had come to search her person; forget the reply she made, but she was laughing at the time. She made some reply irrelevant to the subject; searched her person. She offered no resistance, but facilitated it by standing passive and raising her arms.

She was singularly dressed, but this was not one of the reasons which induced me to believe she was not sane. It was the wild and unnatural appearance of her eyes and the strange, unusual expression of her countenance. When a person is terrified, the eye and countenance will assume an appearance and expression. It is also the case with persons in liquor, and after the use of liquor, upon the approach of delirium tremens. Insanity is sometimes simulated; do not recollect of ever having seen a person who feigned insanity; have read periodical publications on the subject of insanity, but not recently; have never made it a particular study; believe it is laid down in standard works, as not difficult to distinguish between real and feigned insanity, yet there are cases where it requires a close and long examination to discover the difference.

The longest period I remained with Mrs. Robinson was twenty minutes. I did not prescribe for her nor did I visit her at all in a professional capacity. Having

the keys of her house, and the custody of her property, my visits were solely of a business character. At our first interview came to the conclusion she was irrational.

*Mr. Hogeboom.* Will you inform us what inducements led you to visit a crazy woman two or three times a week about her property?

*Dr. Bontecou.* There were no inducements held out to me, sir. I had the keys of her house. On my first visit I did not inquire in relation to her property. When I first spoke of the keys, she made no reply, but kept on talking and laughing. There was nothing about the transaction of obtaining the keys, that produced the impression in my mind that she was not rational. The precise remarks she made, in reference to the keys, are forgotten. She did not request me, at that time, or any other person in my hearing, to bring down her apparel from the house; have forgotten entirely the details of our conversation.

At the second interview, something was said about her property; cannot state the subject of her observations on this occasion; only remember she was moving about the room, talking and laughing incessantly. Neither can I say who was there; think either the sheriff or Dr. Hegeman, his deputy, was in the room or near it. She did me no bodily harm.

At a subsequent interview I remarked that Lanagan and Miss Lube were dead. She made some observation in reply, but it had no reference, whatever, to the subject; cannot say what it did refer to. She did not seem



shocked or startled in the least, nor was there the slightest change in her countenance at what I said.

Subsequently told her that Mrs. Lanagan had requested the return of some articles belonging to her, which were at Mrs. Robinson's house: some cooking utensils and a bonnet; inquired if I should give them up. She looked at me and said, "Why not?" Regarded this as both pertinent and rational.

At other interviews she talked about dresses; do not consider a person insane who talks about dress; regarded her remarks at the time, irrational, because they were wholly disconnected from the subject of conversation. Sent down dresses to Mrs. Robinson from her house, either at her own request or of some one connected with the prison, or of my own accord. She said nothing to me in relation to the jewelry. Dr. Hegeman, the deputy sheriff, was my successor in charge of the property.

When I told her she knew she had poisoned those people, it seemed strange to me that it did not effect her person or manner. A sane person would say something pertinent in regard to such a matter. It did not seem strange that she did not admit the charge; that was not an evidence of the absence of reason; suppose a sane person would be rather inclined to evade the question; nevertheless, it is still singular that she did not say something about it, either one way or the other.

*To Mr. Beach.* In my practice have often had patients tem-

porarily feverish and delirious. My practice in the city has been tolerably extensive. At my first interview the expression of her eye did not strike me as that of drunkenness, nor her face indicate drunkenness. On my visits my attention was directed to the condition of her mind. Mrs. Robinson's observations were not at all responsive to the questions propounded to her. Uniformly she appeared in a laughing humor and was full of levity. This mood, her failure to reply pertinently to the most simple and direct questions, the wildness of her eyes, the eccentricity of her manner and the strange, unnatural expression of her countenance, were among the reasons which drove me to the conclusion that the woman was irrational; am not aware that she had access to stimulating drinks after her incarceration.

*Professor Francis E. Daikin.* Am a chemist and conducted the analysis of the contents of the stomachs of Lanagan and Miss Lube, in connection with Dr. Bontecou. The result of that analysis was the discovery of arsenic. We applied five or six different tests, each terminating in the same result; discovered a sufficient quantity to produce death. The contents of the stomach are in the jar before you. We analyzed the sugar, but found no deleterious or poisonous matter in it. It was afterward used by Dr. Bontecou's family. The contents of the paper found under the carpet at Mrs. Robinson's residence was likewise analyzed and was found to be arsenic,

## THE DEFENSE.

*Mr. Pierson.* Gentlemen, the defense of a prisoner indicted for the high crime of murder, imposes a painful and onerous duty upon counsel. It is not unknown to some of you, gentlemen of the jury, that in years past I was prosecuting attorney for the county of Rensselaer, and at times was called upon to prosecute offenses of this character. In such trials, having adduced all the legal evidence in the case, I felt that I had discharged my duty. I never have, and in whatever circumstances I may be placed, I never shall, introduce testimony I know to be improper. I have never allowed my professional zeal to overcome my sense of justice, so far as to attempt to introduce, as dying declarations, what were not such. I have never argued captiously with the court, and this I can say, especially, I have never, in opening an important cause to the jury, claimed that I would bring forward testimony to substantiate alleged facts, and failed to do it.

In capital cases of this kind the counsel for the prosecution do not have the same responsibility resting upon them as the counsel for the defense. While public prosecutor there were, indeed, instances where, through the adroitness of the opposing advocate, or from other causes, I believed the prisoner was acquitted against the weight of evidence. But if I did not always succeed, in cases where I deemed that justice demanded a conviction, I consoled myself with that benign passage of scripture which declares that it is better that ninety and nine guilty persons should go unpunished than that one innocent man should suffer. Let me say further that none but those who have defended a prisoner convicted of a capital offense, and who has been so convicted when his counsel believed him innocent, can imagine the pangs of one thus situated. I have, in my life, been so situated, and have felt that I suffered more than the convicted prisoner himself.

We, as counsel, have nothing to expect from this unfortunate woman. In the language of the grand juror's oath, we act neither for reward or the hope of reward. The prisoner I

never saw or heard of until the commission of the alleged offense. I was informed why she was in jail—that she was charged with poisoning two persons. I was told by the officers of the prison that she was insane. I felt it my duty—perhaps it was not—to go and see her. I found her a raving maniac—her mind tottering—her reason dethroned. It was weeks and weeks before I could ascertain from her anything at all satisfactory. I do not ask you to receive what I assert as evidence. I am not going to be a witness; but what I say shall be substantiated by the oaths of men whose veracious characters are far beyond the shadow of reproach. It is my solemn opinion that she should never have been indicted, and, moreover, that she never would have been had proper representations been made to the grand jury.

Indeed, gentlemen, her conduct here in court, which you have all yourselves observed, shows conclusively enough that she is not ‘clothed in her right mind.’ I do not say or believe that she is now wholly insane, but her mind has lost its balance in a degree. That she was insane, however, in every sense of the word, both before and after the death of Timothy Lanagan, the evidence will be sufficient to convince you beyond a doubt.

It has been a matter of consultation in this room today, between the counsel, whether we should not, at the close of the evidence of Dr. Bontecou and Mr. Ostrom, risk the case with the jury; whether, what they have testified does not take the case out and beyond the language of the indictment, which charges her with premeditating the act which she is here to answer for, and which implies she knew what she was doing, and intended to effect these deaths. I need not say that unless she did it with a perfect mind, and with the intention to destroy life, the charge of murder cannot be maintained against her.

We know nothing of the antecedents of this unhappy woman. What her life and character have been, who she is, or from whence she came, she utterly refuses to disclose. We know nothing of her friends, family, or connections. All we know of her is, she is a lady of unusual intelligence and highly

polished manners. We know, moreover, she is here, charged with the crime of murder, and that is all.

There are two grounds, gentlemen of the jury, upon either of which we shall confidently demand at your hands the acquittal of the prisoner at the bar. One of these grounds is insanity; and I have already said that we did think of submitting the case to you on that ground alone, introducing no other evidence whatever. But then it occurred to us that, in the possible event of her conviction, we should have it to reflect upon through life, that there was evidence we might have introduced which would have saved our client.

The testimony of Mr. Ostrom exhibits her in a state of great excitement, and not excited by liquor, either, on the Saturday night previous to the alleged murder. She was also unnaturally excited at the time of the murder, and the frenzy was upon her when she was arrested. Think of her, laughing and joking with the policeman on the way to jail! And we shall prove to you, in addition to what has been already testified, that she continued irrational for weeks and weeks after her confinement in prison. Long, long will it be, I trust, before a jury of the county of Rensselaer will convict under circumstances such as these.

It will be shown, in proof of her insanity, that long before the alleged murder, the prisoner became acquainted with some young women residing in her neighborhood, one of whom was a dressmaker, and that they were at her house occasionally. One of them will testify that previous to this occurrence the prisoner brought a black silk dress to her to repair; that first she said it was too short, then that it was too long; first that she cut it herself, and then that a dressmaker cut it. She told this young woman that her father was a lord, and that she was turned out of the castle because she married a poor man; and on saying this she cried, and then she laughed, and then she danced. The witness will tell you, also, that after this she met Mrs. Robinson having a daguerreotype and a bunch of flowers in her hand. She said it was the picture of her mother, and that the flowers were gathered in the garden of the king of France; that her mother died when she

was a little child, and that a step-mother was the cause of all her sorrows. At one time she declared that she was educated at a nunnery; at another time that it was at Mrs. Willard's seminary. On a subsequent occasion she sought the young woman with revolvers in her hand, with the request that she would accompany her into the city. And again she called on her at an unusual hour, dressed only in her night clothes and cap, and begged the loan of a dress to go down after a warrant for some one. She obtained the dress, and left; but soon returned, arrayed in black satin, thanked the young woman for the favor, sat down, but made no allusion to the warrant. She imagined that she was slandered, and that people were pursuing her; and you remember, gentlemen, the wild story of her husband being injured on the cars.

Furthermore, we shall corroborate, by Dr. Hegeman, the deputy sheriff, not only all that Coroner Bontecou has stated, but shall show by him that for months after her imprisonment she was utterly and absolutely insane; and that this state of mind cannot be attributed to the effects of intoxication, inasmuch as she had no liquor in the jail.

Previous to her arrest she was going from place to place, palpably and unmistakably an insane woman. You, gentlemen, may have seen just such persons as she was on that evening. I have now in my eye a juror, who must remember having seen a woman who was long in the habit of wandering through the streets of Troy, singing as she went,

"When I can read my title clear  
To mansions in the skies."

That of itself was evidence enough to everybody that she was crazed, and no one doubted it. This is a general outline of what we expect to prove, to establish the fact of her insanity previous to, and on the day, of the alleged murder, and for a long time after she was committed to jail.

We shall endeavor, also, to show you, gentlemen, that she is entitled to acquittal on another ground. There is not a particle of evidence that she put the arsenic in the beer. True, she had arsenic in her house; but there are thousands

of houses in Troy where arsenic is kept. Besides, gentlemen—and I appeal to the court to sustain me in what I say—there has never been a case of conviction of murder in this country where it was not shown that an adequate motive existed for destroying the person. What motive was there in this case? None, whatever, under heaven. To be sure, there was the disturbance at the dance, but that was all reconciled, and they had become friends again; visiting each other, and she trading at Lanagan's up to the very morning of the murder.

In the case of John Hendrickson, after it was abundantly established that he had murdered his wife, his counsel contended that no motive had been shown, and the prosecution were obliged, in order to sustain their case, to go into proof as to the estate of his wife, and his interest in getting rid of her. But where will you find the motive in this case? There was none.

I may be permitted to remark that there is no human being whose evidence can give color to the suspicion that Mrs. Robinson put poison in the beer, except Mrs. Lanagan. And what does she say? Why, she saw a white paper in the prisoner's hands. That is all. But the theory the prosecution will ask you to adopt is that Mrs. Robinson mixed the poison with the sugar and put the sugar in the beer.

I desire not to attack the character of any being; but in this matter of life and death, we must look at things as they really are. Who was Miss Lube? An unmarried girl. Who was Mrs. Robinson? A beautiful woman, residing in the neighborhood, and spending much of her time at the house of Lanagan. Jealously, gentlemen, jealousy has committed murders as foul as this. But I cast no aspersions. My duty and my purpose is to defend this truly unfortunate lady, and her cause I am not afraid to entrust in the hands of an intelligent jury.

JUDGE HARRIS. Before proceeding further, we will make one more effort to go on with an unmasked face. I trust I feel all the delicacy consistent with my position, but I must do my duty, fearlessly and fairly. Notwithstanding all my

efforts this morning, one veil was withdrawn and another substituted. As yet, I have been unable to see the face of the prisoner, and I doubt if any one of the jury could identify her out of doors. I know the sting is severe, but it cannot be helped. The jurors and witnesses must confront the prisoner. If she will not voluntarily remove the mask, it must be taken from her.

*Mrs. Robinson*, after some hesitation, threw her veil partially over her bonnet, and sobbing, bent forward, burying her face entirely in her handkerchief. She was, apparently, much affected throughout the afternoon; and, notwithstanding the determined order of the court, effectually succeeded in concealing her face from view.

#### THE WITNESSES FOR THE DEFENSE.

*William H. Hegeman*. Have been a practicing physician, am now deputy sheriff. Was at the jail at the time the prisoner was brought there; had never seen her previous to that time. Since her imprisonment have seen her usually three times a day. The 25th of May first saw her that evening going up the stairs, and once afterwards in the room in which she was confined; saw her the next morning in the presence of the sheriff. Her appearance was strange and singular, and her dress was very much disordered. There was an unnatural appearance in her eyes, and her countenance seemed to be expressionless; had but little conversation with her; enough, however, to discover that she did not at all appear to realize her condition.

Her first night in prison, she remained in the room usually occupied by women. The next morning she was removed up stairs, in the room she now occupies. Her remarks, when she made any, were disconnected; she seemed irritable and sullen.

While seated she was very quiet, but when she rose from the chair, her movements were quick and impulsive. Do not know how she passed the night of the 28th, but on the night of the 27th, watched at her cell door; she was raving, calling for assistance to protect her, and passing violently from one end of the room to the other. This continued all night. The first week or two could draw but little conversation from her. At the time of the funeral of Lanagan and Miss Lubee, I remarked the funeral ceremonies were taking place. She looked a little sober, and said: "It is queer, isn't it?" but immediately commenced talking and laughing on some other subject. Thought her of unsound mind. She has always exhibited great reluctance to be thought insane.

While in jail she has destroyed a part of her furniture. Of six sofa-bottomed chairs she has destroyed five; also a table, dishes, and a silver cake basket. Has complained of ill health a good deal; cannot say what the state

of her health was at the time of her arrest. She had no intoxicating drinks during the first three or four months of her imprisonment. Since last autumn she has had it as a medicine, by my direction. During the month of July or August previous, it was supposed she would die; was not physician to the jail, and did not attend her in that capacity. Dr. Adams was her physician.

*Cross-examined.* My age is 26; have practiced medicine about one year; graduated at the University Medical College, Broadway, N. Y., between three and four years ago; have practiced medicine one year, aside from the time I was physician to the jail.

On the morning of May 26th her dress was disordered and hung loose about her. It was dirty and muddy, and appeared to have been long worn without being washed. I procured her other apparel at her house; her trunks were brought to the jail. After this she dressed better, when she dressed at all. She frequently, however, wore her night-clothes all day.

There was a wild appearance about the woman; it seemed impossible to catch her eye. This is not now so much the case; should not regard that alone as a sure evidence of insanity; a good many sane persons have a wild appearance about the eyes, some more than others; believe the prisoner is now of unsound mind, but not to so great an extent as formerly; think she has been partially insane ever since she has been in jail. Her countenance is not now so expressionless as it was when I saw her the 26th May. Do claim to pos-

sess that degree of medical knowledge and skill that would justify me in passing an authoritative opinion as to a person's sanity; never had, in my private medical practice, but one case of insanity.

Watched at her door on the night of the 27th because I was apprehensive she might destroy herself. She was raving. She called on the watch and the police, and said she would be killed. She had not been supplied with any liquor. She sometimes used snuff; do not know of any opium being sent her, nor of her requesting any, nor do I believe she has had any. While in jail she has been supplied with no other stimulants than liquor, as a medicine, and some snuff.

It was at the last court of oyer and terminer I came to the conclusion she did not like to be considered insane; thought so because she told me so. She did not say she was reluctant to be considered insane, but insisted she was not insane.

She broke up the chairs sometime last winter. The chairs all belonged to her. She had a rocking chair which she did not break. This was after she was indicted, and after she had been arraigned to answer the indictment. She broke them in pieces and burned them up. She had no particular difficulty with any person, as I am aware of. She is violent in her temper. In the room she occupied there were two other tables besides the one she destroyed; also a looking glass, washstand and wardrobe, a bed, dishes, trunks, carpets, etc., which she did not destroy. She endeavored to melt the silver



cake basket; asked her why she destroyed those articles and she replied they were her own and she would do with them as she pleased.

Did not prescribe ardent spirits for her daily; when I did, it was wine and brandy, because she complained of headache and sleepless nights. She never asked for beer; know nothing of her husband. The liquors I ordered were the only liquors or wines sent to her room; know of no little indulgences she has had in the way of liquor; have prescribed Dovers powders for her occasionally, but opium in any form I have not prescribed.

*Mary J. Dillon.* Know Mrs. Robinson. Our residence is but a short distance from where she lived. Before she was put in jail, saw her frequently. My business was dress making. Sometime in the month of March, 1853, she had a dress she wanted me to repair; I told her I had so much sewing in the house didn't see how I could do it right away. She said she wanted it done so bad she would pay me any price. She told me first she cut the dress herself, and immediately after that a dressmaker cut it; said a man and his family who lived next door to her had slandered her; that she was a lord's daughter in Ireland, and that she was turned away from her father's castle for marrying a poor man. Then she cried, and then she laughed and then danced around the room.

A short time after she showed me a daguerreotype representing a lady with a bundle of flowers; said it was the daguerreotype of her mother, and that the flowers

were gathered in the garden of the king of France; said her mother gave her the likeness when her father turned her from the castle; she told me her mother died when she was a small child; that she was educated at a nunnery, and again, that she was educated at Mrs. Willard's seminary.

Her father, after he had turned her from the castle, she said, had requested her to come back again, and he would forgive her; told me he had sent her a hundred and fifty dollars to purchase a single dress to appear in court against Oliver Boutwell for slander; while standing on the shore one day she said she could jump into the river and swim until she was tired and then she had a cork she could put between her teeth, and rest in the water and not sink.

Her house was on the river. We saw a boat coming down. She said that boat couldn't pass, because Oliver Boutwell had stopped the navigation; called to the men in the boat, but they didn't hear her; had a revolver in her hand, began to climb up the rocks on the shore, then turned to me and said, "Mary, wouldn't I make a glorious soldier?"

She told me she was sick and sent for Dr. Burwell and that he came and left her a bottle of medicine. She suspected the medicine was poison and so she went to a neighbor and got a dog and gave the dog some of the medicine and he died in half an hour. She then corked up the bottle and threw it in the river and had to pay for that dog, she said, five dollars.

I recollect her coming to our

house without an outer dress on at 4 in the morning, about a month before her arrest, dressed only in her night clothes and a white sun-bonnet; had on no shawl; wanted me to lend her a dress, saying she wanted to go down street to buy a revolver and get out a warrant for Dave Smith, for slander; let her have my clothes and she went away with them. On another occasion she came to our house about 12 at night. She roused us up; wanted my sister to go after Dr. Burwell, saying her husband had just come home and was very sick; told my sister if she would go, she would furnish her with a revolver, to protect herself, and pay her a large sum of money. Mrs. Robinson then said her husband was not sick; it was not to see him that she wanted the doctor to come; but that he had been at her house the night before, and insulted her, and she wanted to get a chance to blow his brains out.

Once told Mrs. Robinson to go home; that I did not want her there. She said she would not go, and that she would let me know what authority she had there. Presently she left; in a day or two she came in; said I had been slandering her, and that she had a warrant for me; inquired what I had said about her. She made no reply, but came up and kissed me, and asked me to forgive her.

*Crsos-examined.* Was then living with my father, who is a gardener, and is generally about home; have an older sister, but I was the oldest of the family at home; am seventeen years; was not acquainted with Mrs.

Robinson until she came to have her dress altered, but had seen her before, going into Mrs. Lanagan's. She said she went into Mr. Galvin's one day, and a man there insulted her, and attempted to lay violent hands on her; but that she drew her revolver, and bid him stand. She took hold of me the same, she said, as she took hold of the man. It frightened me, but she laughed, and looked so pleasant about it, that I thought little of it afterward. She laughed to see me frightened.

Have seen two or three women when they were in liquor, but cannot say that Mrs. Robinson was intoxicated at this time; never knew her to drink anything stronger than peppermint cordial.

*May 25.*

*Anthony Goodspeed.* Am a resident of Troy; stay in Center Market; think I should know Mrs. Robinson if I could see her. She came to the market the last day of March, 1853, in the afternoon; wanted to buy game; asked me if we had any; told her the season was over. She said she wanted to get some wild meat. She was there about fifteen minutes, and during that time asked me for game more than a dozen times. She had a great many questions, turned on her heels, and moved about strangely.

Said that she had been at the justice's court and taken out half a dozen summonses and warrants for her neighbors, and that she was going to make fools of them all. She placed her foot upon the stall and asked me to tie the string of her gaiter; as soon as

I had tied it, round she whirled and off she went.

Officer Wells and Phillips were at the door, and they told me it was Mrs. Robinson. She said people were abusing her at the dam.

*Cross-examined.* Did not think she was in liquor. Her gaiter was loose. She did not give me the names of any persons who had abused her, nor say anything about getting men discharged at the state dam.

*Mary Jane Dillon* (recalled). Can't recollect what the immediate subject was that led her to say that her father was an Irish lord. Her manners were very agreeable, and I was pleased with her conversation, but did not believe her stories.

At this interview, she said besides, "My father was an Irishman; I was born in Vermont." Before this she had told me that her father was an Irish lord, and lived in a castle.

When she talked about her mother's death, and when she showed me the daguerrotype, she cried violently. Then she commenced laughing, and then she jumped and skipped around. She told me that her father was a French lord; did not tell me the name of the poor man that she was turned away for marrying. Her age, she said, was twenty-seven.

Her conversation, part of the time, was agreeable and pleasant, and part of the time otherwise. During some of it she was coarse and profane. There was no person living in the house with her. She came over after me; I accompanied her home and remained with her all day; took dinner with her and began

to feel on intimate terms. For two weeks we saw each other daily at our house or at hers. Her conversation rendered it agreeable, although there were some things in it unpleasant. It consisted of such language as ladies do not often use. The character of it was profane and she uttered some obscene words.

She spoke of the man she married; said he was a contractor on the railroad and that his name was Robinson; also told me what her maiden name was, do not now remember it.

Said yesterday that I did not think I ever saw Mrs. Robinson drink anything stronger than peppermint cordial; have, however, seen her drink strong beer, frequently; have seen her when I thought she was a little intoxicated by strong beer or cordial; had no thought about her being under the influence of liquor when she called at our house, at 12 at night; only thought it was strange conduct. The dress I loaned her when she came and waked us up, was muslin de laine. It was returned uninjured. When she wanted to shoot Dr. Burwell she was very angry; but just before, when she said her husband had come home sick, she did not appear angry. She did not speak at much length about her husband, and what she said was mild; but when she spoke of Dr. Burwell, she became profane and called him bad names; do not wish to tell what she called him; it was wicked and obscene; never saw the doctor at her house. Did not associate with Mrs. Robinson long after that time. Her associates were the Lanagans. Can't say how long prior to her

arrest it was that my intercourse with her was broken off entirely. It was after she came to our house in the night that I told her to go home. When she came back and told me she had a warrant for me, her manner, at first, was very angry. We had no great quarrel, only a little dispute—made it all up before we parted; never went to her house again.

During my various visits to Mrs. Robinson's house have seen Mrs. Lanagan's sister there and my father there at work in the garden; saw another man there one day, do not know who he was; had but a slight glimpse of his face; he was a middle-aged man. She told me it was her husband, and then again she told me it was Rev. Dr. Potter, of Albany.

*Edwin Brownell.* Was overseer of the poor a year ago. My office was in the basement of this building; saw Mrs. Robinson there some time in April, 1853, on a Sunday evening. She asked whether she was in the office of the chief of police, informed her she was not; I told her the office she inquired for was near the jail in Fifth street, and that she would there probably find the chief of police. She intimated that she wished me to accompany her.

She said there had been a lot of rowdies about her house; that they had once broken into it and were going to attempt it again. She wished me to request the chief to send up a policeman to protect her; told me where she lived; in a white cottage with pillars, adjoining Boutwell's residence, in River street. I went over to the residence of the chief

of police, saw him, and returned; advised her to go home. The chief of police promised me he would send some one up to protect her and it was his request that I should try to get her home. She sat there nearly an hour; would not consent to go unless I accompanied her.

She made many complaints of rowdies attacking her, and said she had not been well attended to of late. I asked who had neglected her?

She replied, ——; said she had not seen him for a long time and inquired of me if I was acquainted with him; told her I was; asked if I had heard he was going to marry Judge G.'s daughter, attending the seminary? told her I had not; said she was his lawful wife; she was married to him at his father's house and he would have to avow it on his return, or she would take his life. Asked me what I thought could be the reason of his remaining away so long; told her he was probably attending to the "breaks" on the canal. She declared herself devoted to him and said she had not seen him for weeks.

She was laboring under great excitement; thought she was slightly intoxicated and did not think she was entirely sober; imagined she staggered a little when I first observed her in the hall; may have been mistaken, it might have resulted from her trying to find her way in the dark, but my impression was she had been drinking. Did not know at this time where —— was, but was informed he was in Washington. He returned about the first of May; saw the lady again on the same day he

returned, about 9 in the evening, on the corner of First and Congress streets; she was in disguise; had on a white sun-bonnet and was negligently attired in a loose dress; should not have known who she was, had I not recognized her voice. She was leaning on the arm of an old man, Mr. Haley, and inquiring of a person on the corner where ———'s boarding-house was. The person directed her to Mrs. Brewster's. She passed on and I have not seen her since.

*Cross-examined.* Went up home with her, to her cottage by the river, as requested by the chief of police. Went into the house, where she showed me a revolver and two single-barreled pistols; loaded them for her; she had powder and ball in the house. She pointed to some shirts she had done up, but my impression is that she said they belonged to ———.

*John H. Knickerbocker.* My boarding place in the spring of 1853 was at Mrs. Brewster's. On Saturday evening, May 21st, between 9 and 10, in Congress between First and Second streets, my attention was drawn to prisoner; she was leaning on the arm of an old man and walking very slow; she asked me to direct them to Mrs. Brewster's boarding-house, I followed them. The old man went up and rang the bell; afterward she went up. She then stepped back and met me, and as she met me, she drew a pistol and said, "You see I am prepared not to be followed, sir!" was boarding there at the time. She was very much excited and unsettled in appearance.

*Dr. Hegeman (recalled).* Mr.

Jennyss came to the jail to see Mrs. Robinson the morning after I watched at her cell door; she said she had heard people about the jail door grinding knives for the purpose of destroying her and that she had boiled a kettle of hot water to destroy them; begged me to assist her; assured her the adjoining rooms were dark cells, unoccupied, she declared she knew better and there were people all around who were trying to slander her; that they could not reach her in any other way than by being committed to jail, and entreated me to bring her a revolver and she would protect herself; could not convince her to the contrary; said her persecutors were the Boutwell people and that they had managed to get into the jail. On the third morning after her imprisonment, she seized hold of me very violently, laughing immoderately, begged I would assist in protecting her; told her there was no occasion for alarm; that no one should harm her; in order to disengage myself, I had to push her forcibly away.

*Cross-examined.* Knew all these things when I testified before; have only had two or three conferences with the prisoner's counsel and yesterday was the first time I had an interview with any of them; have never conversed with Mr. Storer or Mr. Jennyss on the subject, except, I used to tell them, occasionally, when I met them of her conduct in the jail; never told Mr. Jennyss, in particular, any of her singular stories. When she burned the chairs, she complained we did not give her sufficient firewood, but did not

threaten to burn them if we did not supply her with more; used to procure for her two or three pounds of snuff at a time, once in a month or two; have no positive knowledge what use she made of it. We furnished her with the usual amount of fuel; nevertheless, she frequently complained of being chilly.

*R. C. Jennyss.*<sup>a</sup> Was present at the jail the day after the arrest and two or three times subsequently; heard the conversation between Dr. Hegeman and the prisoner, which he has just related; made an effort to have a conversation with her, but she appeared unable to converse connectedly. She was much excited and conducted herself strangely.

The second morning after her arrest she told me she was going to be killed; that they had tried to kill her the night previous; asked her who? She said a mob of two or three hundred persons had broken into the jail and just as they had got to the door the sheriff came and stopped them, "but," she said, "I shall be killed, for a man and woman up town have caused a complaint to be entered against themselves in order to get in the jail next to me, and during the night, they heated a cauldron of boiling water, came to my cell, broke it open, began to abuse me, and gave me a choice, either to get in myself, or they would put me in." Said she told them she knew she had to die, and if they wouldn't abuse her she would get in, but just then a noise was

heard at the door and they ran away. Placing her hands on her dress she said, "Don't I look shabbily?" and began to laugh. Her eyes were distended, the pupils very much dilated and she had a wild and frightful look. The following day she told me she should escape from the people who were persecuting her, as the sheriff had agreed to let her out that night and she felt relieved.

Saw Mrs. Robinson three or four weeks before her arrest in the recorder's office. Her appearance was wild and her conversation incoherent; expressed an opinion to the recorder after she left that the woman was deranged.

*Cross-examined.* Am an attorney in this city, 32 years of age, and a partner of Mr. Storer, one of the counsel for the prisoner; have never been her counsel; went to the jail purely from motives of friendship for another person, not at his request or employment. The motive ceased after a week or ten days; went afterwards from motives of curiosity.

Heard of the arrest early the next morning and immediately repaired to the jail, announcing to her that I came as the friend of ——. I had never seen her in company with him; had heard his name mentioned in connection with hers, prior to the arrest; had also heard she had letters of his, and to avoid the scandal that might arise from an exposure of them, went to her for the purpose of obtaining

<sup>a</sup> JENNYSS, RICHARD C. Admitted to Bar, 1847; justice of the peace, Troy, 1866-1875. Died 1898. See Weise's "Troy One Hundred Years" (1789-1889) 1891.

them; did not know the fact that they were acquainted, but had only heard of it. She finally consented to give them up, but did not have them with her in the jail; asked her to write an order on the coroner. She pretended she could not write her

name, but authorized me to sign it, in the presence of Dr. Hege-  
man. It was written to the bear-  
er, and signed Henrietta Robin-  
son; made application for them  
to the coroner, but the order was  
protested and I never received  
them.

*Mr. Beach* inquired how the Court would rule in regard to medi-  
cal works, touching the question of insanity? whether citations from  
those works might form a part of the argument.

THE COURT. Such is the usual practice.

*Mr. Beach.* Then the evidence for the defense is closed.

### IN REBUTTAL

*John Upton.* Have lived in  
Albany twenty years and know  
the prisoner, but not by the  
name of Mrs. Robinson; have

seen her without the veil. In  
March, 1851, she resided in  
Albany. I knew ———.

*Mr. Hogeboom.* Did you see the prisoner in company with him  
in Albany, in March, 1851? This question was objected to by the  
defense.

*Mr. Hogeboom.* Your Honor will readily recall to mind that  
Mr. Brownell's testimony shows that the prisoner spoke to him re-  
peatedly of ———. We did not draw that gentleman's name into  
this trial—it was the other side. Now, I suppose they intend to  
make this use of Brownell's testimony: they will say, at the time  
he saw her, she talked strangely about many things, the same as  
she had done to other witnesses, and among these strange things,  
was her assertion that an intimacy existed between herself and  
———. I can imagine no other use they can possibly make of it.  
Unless we prove her in his company, which we propose to do by  
this witness, the jury will be told, that while this woman claimed  
to be intimately acquainted with him, there was not a particle of  
evidence she ever saw him. Now, if your Honor please, we  
offer to show she was acquainted with him, and, therefore, her  
speaking of him did not indicate insanity, but quite the contrary.  
She knew him and was laboring under no delusion in regard to  
him. We propose to prove by Mr. Upton, the witness on the stand,  
that he saw ——— at this woman's house, in Albany, in March,  
1851, sitting with her at her table. We wish by this means to dispel  
at once the idea, that in speaking to Mr. Brownell as she did, the  
prisoner gave any evidence of a deluded and insane state of mind.

JUDGE HARRIS. It seems unnecessary to establish the point con-  
tended for by the prosecution and moreover, it is likely it will be  
controverted.

*Mr. Hogeboom* offered to prove similar intimacies between the  
same parties in Troy, at a later period, but they were rejected.

*Oliver Boutwell.* Live in the premises adjoining Mrs. Robinson; have seen her often in the streets previous to her arrest, when she was the worse of liquor.

Am the proprietor of a mill in that neighborhood, about three hundred yards from my house, on the east side of the river, below the state dam. There is a lock there through which boats pass. Boatmen have complained that the water from my mill made the passage difficult, by driving their boats over on to a rock in the vicinity. These complaints were made in the spring of 1852, by the Lansingburgh and Waterford boatmen generally, and continued up to the spring of 1853.

*Peter Cox.* Last year kept a grocery in North Second street; knew the prisoner, she lived in our neighborhood. She was in the occasional habit of getting liquor at my grocery. Sometimes she drank it there and

sometimes she took it home with her. She generally purchased the very best liquor I had and sometimes got a little intoxicated. She usually bought half a pint of brandy or a quart of beer at a time. She was nearer Langan's grocery than mine. Was engaged on the canal between West Troy and Albany. She never made threats she would have me discharged.

*Franklin Bowman.* Am one of the constables of this city, saw Mrs. Robinson at the jail the evening of her arrest and witnessed her interview with Coroner Bontecou. She requested us to bring from her house a dress and some other articles of clothing and her gold watch. There was nothing strange in her manner of asking for them, as I discovered. Officer Burns asked her for the key to her house and she gave it to them. Her appearance and manner were somewhat excited.

## THE SPEECHES TO THE JURY.

### MR. TOWNSEND FOR THE PRISONER.

*May 26.*

*Mr. Townsend* said that physical debility would prevent him from making such an argument as the importance of the case demanded. His associates, however, had imposed upon him the duty of presenting one branch of the case to the jury, more from the fact of his standing in a different position from them, than from any ability he possessed of doing justice to the subject. Thus pressed into the position in which he found himself, the only course which duty compelled him to pursue, was to remark honestly and fearlessly upon the testimony in the cause, let the consequences be what they might.



The opposing counsel are among the ablest gentlemen in the state, educated in the same school, and born and nurtured in the same county with Jordan, Williams, and Van Buren; and these are the men with whom I find myself in conflict, and with whom, in this battle for the life of my unhappy client, I am called upon to contend.

Not only on this account, but from the fact that the defense of insanity had come to be looked upon with unreasonable suspicion, he felt himself embarrassed. That suspicion, however, he declared to be unjust, because in the whole of his practice of twenty years, during a part of which time, like his associate who had opened the defense, he had been the public prosecutor—the plea of insanity, in capital offenses, had never been resorted to but once. That exception was the case of one Patrick Conway, who interposed the plea of insanity, but whose infirmity, while he was yet in jail, became so palpable and apparent, that he was finally discharged by common consent. He referred to the case of Freeman, who murdered a whole family, near Auburn. In that case, Governor Seward, against unanimous public opinion, and the furious clamor of the populace, contended that he was a lunatic. The trial occupied a month, and he was convicted. It was a most horrid murder, and the perpetrator was a poor, ignorant negro. Governor Seward was dissatisfied with the conviction, and appealed from the prejudiced verdict of the jury; but before the case could be brought to argument in a higher tribunal, the negro died in jail, an evident and universally acknowledged idiot.

*Mr. Townsend* referred to a great number of cases where prisoners had been acquitted on far stronger evidence than had been brought against the woman at the bar; among others, to the Phelps case, where the jury rendered a verdict of acquittal, though morally convinced of the prisoner's guilt, on the ground that there was a possibility of his innocence, and the doubt suggested by that possibility was properly thrown in favor of the prisoner. He also referred to the case of Mat. Ward (see 3 Am. St. Tr. 70) recently tried for the murder of a schoolmaster in Louisville, Ky., who escaped

on the same grounds that acquitted Phelps; and also to the affair of the steamboat *Caroline*, destroyed on the Niagara river in 1837 (see 7 Am. St. Tr. 61). In that case, said Mr. Townsend, a British subject named Alexander McLeod, was charged with the murder of an American citizen, while reposing in fancied security beneath the American flag. On that trial it was proved that he had boasted of the deed, yet evidence was adduced showing that his brags of having fired the vessel, and sent it in flames over Niagara Falls, was all a lie. To the honor of the jury, faithful to the spirit of the law, the prisoner was acquitted.

The newspapers of the neighboring city of Albany had teemed, during the week, with charges against the prisoner, by connecting her with the political fortunes and private history of a celebrated individual, whose name had been reluctantly mentioned during the progress of the trial. This he condemned as unmerciful and unfair.

You have perceived, of course, that the main facts relied upon by the prosecution had been abandoned. Not a man have they found who dare come forward and declare the prisoner sane—not one. How, then, can they ask you to do it? They have not even attempted to produce a particle of evidence that she is sane; and you, gentlemen, it is unnecessary for me to remind you, are sworn to decide according to the evidence.

A wonderful excitement has prevailed in the community, and in the midst of it all the prisoner was alone, a woman whom no one knew, and no one befriended. She calls herself Mrs. Robinson; yet it has appeared that previous to her arrest she was living with a man of another name, though it has not appeared that she was his lawful wife. He commented on the evidence relative to her association with —, and the probable use the prosecution would be likely to make of that evidence; but argued at length to prove that it was preposterous to suppose that disappointment, growing out of an illicit love for him, could excite in her bosom any revengeful feeling toward Lanagan and the girl.

The manner of the prisoner during the progress of the ex-

amination had certainly been strange, mysterious, and unaccountable; but her counsel were not responsible for her acts in court. It was true, she had manifested singular caprices, and evidently possessed something of the will that belongs to the daughters of Eve. He, and his associates, had exhausted their powers of persuasion to induce her to appear unveiled, but in vain. These eccentricities, however—and they were but innocent eccentricities—would not have the effect, he was sure, of prejudicing her case in the minds of an intelligent jury.

And now, let us look a moment at the evidence. A year ago yesterday, a murder was committed in the upper part of this city, at noonday, and without a motive. The woman charged with the crime walks openly about the streets, making no attempt whatever at concealment or escape. I heard the details next morning, and from a mere relation of the circumstances, declared my belief that the woman, whoever she might be, was a lunatic. The absence of all motive, the time and place the crime was alleged to have been committed, the manner of the prisoner at the arrest, and on her way to jail, were all such that it was impossible for a reasonable mind to account for the act, on any other hypothesis than the insanity of the murdereress.

Until the 8th day of December last, I knew nothing particularly in regard to the case, further than I learned from newspaper reports and public rumor. On that day I had occasion to peruse the record of the coroner's jury, and to examine with attention the testimony taken before it. I found that Mrs. Lanagan had testified that there was no cause of enmity existing between her husband and the prisoner, and that Miss Lube sat at the table looking at Mrs. Robinson during the whole time she was holding the saucer of sugar in her hand, and putting it in the beer. Then, I was driven to the irresistible conclusion that this woman did not commit the act at all. The whole story was absurd. The idea that she could put arsenic in the beer, directly before the eyes of the girl, and she drink it, was incredible. If that story be true, all these women must have been crazy together. No, gentlemen, I have stated that I should express fearlessly what I had to say, and now I have

no hesitation in declaring it to be my deliberate judgment, founded upon her own evidence, that it is far more probable that Mrs. Lanagan herself poisoned that beer, than the prisoner at the bar.

There is no imaginable motive that could have prompted Mrs. Robinson; it is easy to conceive one that might have prompted Mrs. Lanagan. Her husband was her junior in years. The murdered girl, from morning till night each day, passed her time at the grocery. This woman, beautiful and fascinating, even after she had sunk to the very depths of misfortune, was in the habit of visiting, conversing, associating with him almost continually. Under such circumstances, is it improbable, on the other hand, is it not most likely and natural, that emotions of jealousy and suspicion should have been aroused in the bosom of his wife. It could not have been otherwise than unpleasant and provoking to her, to see these young and handsome women constantly in the society of her husband. She would naturally desire to be rid of their presence. In her heart, we can readily and reasonably fancy, there was a motive for putting them away. If her account is to be credited, she and the girl, while seated around the table, had consented to take a friendly glass with Mrs. Robinson. Her husband had just retired, and there was an opportunity of committing the deed, if such was her design. She goes out into the grocery for beer. Why, on her return, did she fill but two tumblers, if all three had consented to drink together, as she asserts? She has not answered that. It was merely by accident that Lanagan drank the beer instead of Mrs. Robinson. If this theory is correct, what must have been her surprise when, turning her head and peeping back through the door into the kitchen she saw the poisoned chalice, prepared for another, pressed to the lips of her own husband!

Understand me, gentlemen. I do not charge Mrs. Lanagan with the commission of the murder. She may be innocent—entirely innocent. But this I do declare: it is necessary to prove Mrs. Robinson insane, in order to acquit her of all suspicion.

There was no motive on the part of Mrs. Robinson. The

difficulty at the dance long previous to the 25th of May—of her being ejected from the house—her subsequent abuse of Mrs. Lanagan—had become reconciled and forgotten, and it was fanciful to suppose that any secret anger on that account was ranking in her bosom against any member of the family. That matter, therefore, effectually disposed of, left the prosecution utterly destitute of the least pretension that there was any motive to induce the prisoner to commit the crime.

Perhaps it would be argued she was not deranged, because she could hold rational conversation. To be insane, however, is not to be entirely deprived of sense. On the other hand, the victim of monomania, the form of insanity under which she labored, was frequently very shrewd and cunning on many subjects. It was once held that to be insane, one must be entirely destitute of sense; but under this absurd and exploded doctrine an insane person could not be found—none in the asylum—none anywhere. It is rare that you cannot converse rationally, on many topics, with persons who are deranged. It is only on particular subjects, most frequently, that they reason falsely; put wrong constructions upon facts; draw wrong conclusions, and view things in a distorted light.

*Mr. Townsend* then took up the question of real and feigned insanity, discussing at great length the testimony of Dr. Bon-tecou in illustration of this point, paying that gentleman a glowing compliment by characterizing his opinions in surgical and medical matters as entitled to as much weight and respect as that of any other man in the state. He here read from Dean's Medical Jurisprudence, pages 460-605, to show the difficulty and impossibility of feigning insanity successfully, reading passages from the authority before him, and applying them to the testimony taken in the case.

I pause here to explain why we thought it necessary to introduce the testimony of Edwin Brownell. It was to show at least one cause of her insanity. That witness hesitated to mention the name of a well known individual, until compelled to do so by order of the court. It was with reluctance that we called it forth; but I hold the life of a human being of too

much consequence, to hazard it by the suppression of a fact, however much it may reflect discredit upon any person. There was no cause, that is, so productive of monomania as disappointed love, and he believed the more clandestine it was, the more ardent and absorbing it became. When the mind and the affections of a woman are wholly concentrated upon one person, and when suddenly, from some cause, she is deserted and abandoned by the object of her devotion, it is not unfrequent that wretchedness and despair is followed by a dethronement of the reason. A woman views her husband, or one she looks upon as such, as her all; as everything, in short, that renders life desirable. Not so with man. He becomes absorbed in business, makes money his idol, and soon forgets the gnawings of a lacerated heart amidst the noisy turmoils of the world.

It is true the woman who has maintained proper care of herself, although deserted by her husband, may remain respectable. But hope dies within her, if she has offended society so as not to be respected by it, and is then deserted by her protector. Where on earth can such a one look for comfort and consolation? She has trusted all, and finds herself at last betrayed. Such was the unhappy fortune of the prisoner at the bar, and doubtless it was one of the chief causes that drove her into madness.

I will not say that the evidence furnished here is sufficient to show the connection between the prisoner and —— was all it is represented to be, out of doors. But it shows this—that she was devoted to him and that he absented himself so long that she believed he had abandoned her. Either through business, or other pressing engagements, he had remained for weeks away from her. She felt that she was not only deserted, but was actually so utterly neglected as to be driven to the necessity of attempting, but in vain, to borrow two dollars to obtain the sustenance of life. In this extremity she hears he is about to marry a judge's daughter, at the seminary. This she believes, and the belief, we can readily suppose, was not wholly founded on the fact of his continued absence; for there is nothing truer than that a woman, who does not rely

upon a union sanctioned by law and religion, cannot long enjoy that union without, at times, realizing her degradation, and having fears of ultimate desertion.

In the case of this prisoner all her poor hopes in life were centered on ———. She had sacrificed for him all claim upon society—her virtue, her honor, her all. Now, she was to be cast aside as a dishonored and worthless weed, without a ray of hope, or comfort, or encouragement, to illumine the impenetrable darkness of the future. There never was a more powerful, a more irresistible cause of insanity. There is not a woman on God's footstool who, under similar circumstances—with these apprehensions staring her in the face, these rumors confirming her most agonizing suspicions—but, like this woman, would have yielded up her reason.

*Mr. Townsend* then referred to the fact of the prisoner ridiculing the idea of her own insanity, and read a case reported in the *Law Reporter* of the current month. It was the case of *Adaline Phelps*, indicted for the murder of *Elisha Phelps*, her father, at *Greenfield*, *Franklin county*, *Massachusetts*. She entertained the same idea as *Mrs. Robinson*, in regard to her insanity, and approved "the gentlemanly course of the government in abstaining," she said "from trying to make her out insane." She addressed the jury, in a speech of some forty minutes, in a clear, logical manner, and in quite an oratorical style, claiming an acquittal on the ground of the insufficiency of evidence. The jury, however, decided her insane, and she was sent to the lunatic asylum.

He again quoted from *Dean's Medical Jurisprudence*, to show the difference in cases of insanity, referring particularly to the case of *Ray*, going to establish the fact that the maniac, in committing murder, is not generally anxious to shed more blood than is necessary to do the deed, while the monomaniac exhibits no method, makes no discrimination, but strikes down any and all, one as well as another.

The question of her intoxication on the 25th of May, he next discussed. Drunkenness he denounced as a disgusting vice. The excessive use of inebriating beverages was abhorrent to him, yet he did not feel that a person should be hung

for it. It was a weakness of human nature, and, unfortunately, many of both sexes were its victims. There were certain instances, he said, where drunkenness did not excuse crime. If the offense alleged to have been committed by this woman was done in a mere fit of intoxication, he would not contend for her acquittal. But I have seen no evidence of her being intemperate, until the time when she had become crazed with the opinion that she was deserted by one on whom her affections were concentrated. It is my belief, notwithstanding the opinions of witnesses to the contrary, that she was not intoxicated at the various times they have particularized, but that her excitement, produced by the apprehension of abandonment, gave her the appearance of one inebriated. But if we have proved, and no witness has been called to disprove it, that the prisoner was insane when the crime was perpetrated, she must be acquitted, notwithstanding she was, also, under the influence of liquor. And, in support of this position, he quoted from Curtis' Reports, the case of the United States v. McCane, and also referred to the trial of Murphy before Judge Roosevelt, and read from Dean, page 548.

If, however, at the time of the commission of the crime, she was so far under the influence of liquor as to be suffering under delirium tremens, then she is as excusable as if it was any other description of insanity. But it will not be contended that the deed was perpetrated under the influence of any such disease. The fact that her mind was deranged a long time after, at once stamps any such assumption as entirely fallacious.

He commented lengthily upon the evidence of young Knickerbocker and the Dillon girl, and expressed the confidence he entertained that the jury would not demand the shedding of his client's blood on such evidence as had been laid before them.<sup>b</sup>

<sup>b</sup> As *Mr. Townsend* sat down, the prisoner bent forward and whispered: "A very able speech, Mr. Townsend, but you might have said all that was necessary in fifteen minutes. The idea of my insanity is absurd."



## MR. VAN SANTVOORD FOR THE PEOPLE.

*Mr. Van Santvoord* began by adverting to the importance of the case—the intense interest it had aroused—the fact that the prisoner was a female, and the awful responsibility devolving on a jury who were called to decide the question of life or death. In entering upon the painful duty he was called upon to perform, he felt most forcibly how vain it was in a case like this, where sympathy for the accused was likely to be shared by the judge on the bench, by the people, and by the jury, to expect that full justice to be done which is due to violated law. He comprehended how singularly the circumstances in this case were calculated to excite these sympathies; nevertheless, the impartial administration of public justice must be sustained, or there would be no security for life or property.

The defense has alluded to the case of William Freeman, the murderer of the Van Nest family, near Auburn. That case was not parallel to this. Freeman was tried, convicted, and sentenced to be executed.

*Mr. Pierson.* Freeman was first tried by an inquest of lunacy; the jury decided that he was not of sound mind, but of mind sufficient to be placed upon his defense; that he was then tried and convicted; but, on a second trial granted by the Supreme Court, he was acquitted.

*Mr. Van Santvoord* denied the statement of the prisoner's counsel, that Freeman was ever acquitted by a jury. A new trial was granted, it was true, but before being placed a second time upon his defense, he died in the county jail at Auburn. It was unfortunate, he considered, that the gentleman had referred to that celebrated precedent, because the fact was, that both the jury who sat upon the inquest of lunacy, and the jury who passed upon the offense alleged in the indictment, rejected the plea of insanity, notwithstanding the evidence in proof of it was a thousand fold stronger than any which he has introduced here to substantiate the idea of monomania in the prisoner at the bar.

He then alluded to the case of Mat. Ward, and of Richard P. Robinson, the murderer of Helen Jewett, and remarked that the jurors in both cases had been branded throughout the country, and, he believed, justly, as setting themselves above evidence, and as not having discharged their duty as ministers of the law. It was a little singular, he thought, that the defense should have thus linked the names of Richard P. and Henrietta Robinson.

He had, of course, supposed that insanity was to be the only ground of defense. The facts proved were so positive and conclusive that he had not for a moment imagined any other would or could be attempted. In that conclusion, however, he found himself mistaken. Even the commission of the crime, as charged in the indictment, is denied, and a remote suspicion thrown out that the act was committed by another. This suspicion, however, was founded, as the jury were aware, not on any evidence in the case, but was merely a chimerical and insane inference of the counsel.

The irresistible evidence was, he said, that Timothy Lanagan and Catherine Lubee were murdered by Henrietta Robinson at the time and in the manner set forth in the indictment. But the counsel who preceded me has endeavored to show the absence of any motive; and, having established that fact to his own satisfaction, deduces the inference that she is innocent. Admitting, for the sake of argument, the logical correctness of his inference, the difficulty in the gentleman's way is this: the fact from which he draws it has not been proved; his premises are assumed and false. Now, the truth was, the evidence had disclosed a motive for the commission of the crime.

In support of this proposition, he referred to the dance at Lanagan's, her quarrel there, and forcible expulsion from the grocery, her violent resentment of it as exhibited in her abuse of Mrs. Lanagan afterward, and contended that this treatment was sufficient and likely to arouse in the bosom of such a woman the desire of vengeance. Again, she was denied the loan of two dollars, and it is easy to imagine her indignation on being refused so insignificant a favor, especially when she

had been "so good a customer," as she seemed to regard herself. The idea of money was in her mind immediately after the commission of the offense. You remember, when she came into Ostrom's drug store, under great excitement, half an hour previous to her arrest, she stated that she had been charged with poisoning two persons, because she would not lend them a hundred dollars. If she had said she poisoned them because they refused to lend her two dollars, would it not have been more correct? She seems to have been remarkably susceptible to insult, and would be very likely to regard the refusal of the loan in that light. This woman is of a reckless and depraved nature, of violent temper, and quarrelsome disposition, and it is unnecessary to show a further motive that actuated her in the perpetration of the crime, than what has been developed by the testimony.

But I differ from the opposing counsel in the position he has taken, that a conviction for murder cannot be had, without proving a motive for its commission. On the trial of the negro Freeman nothing of the kind was proven. The same was true in the case of Green; in fact, there never was an adequate motive for murder in any case. After Green's conviction he confessed that the motive was to marry a woman of less charms but more property than his murdered wife possessed. In fiendish cases of this character, it is hardly necessary to look for a motive beyond that evidenced by the commission of the crime. There was not one case in a hundred where convictions for murder have resulted in which the testimony approached the fullness of that adduced against the prisoner. We have shown, in the first place, that she purchased the arsenic; that a part of it was found concealed under the carpet; that the contents of the stomachs of the victims were analyzed and the presence of the same poison was there found. There is such a thing as moral certainty, as well as mathematical calculation. It seems, indeed, unnecessary to discuss this branch of the case any farther. The blood of the murdered victims is on the hand of the prisoner; and, like the conscience-smitten Lady Macbeth, she may exclaim—"Out, damned spot," in vain. The "smell of the blood" is

there still; "all the perfumes of Arabia cannot sweeten" it; it never can be washed out.

There is an impenetrable mystery, he said, surrounding the history and character of this woman. If the defense had seriously intended to sustain their plea of insanity, they should have dispelled this mystery, and given the court and jury some clue to her antecedents. They have not intimated she belonged to a family in which the misfortune of insanity was hereditary; nor have they given in evidence any cause that would be likely to produce it. Her past career, her character, her face, have been assiduously concealed from observation. In no sense has the veil been raised. Those who have caught a glimpse of her countenance have alleged that it exhibits evidence of beauty. But, relying on the testimony of Mrs. Lanagan, and the girl, Dillon, I feel justified in venturing the conjecture that if that countenance was examined closely, there would also be found lurking there, the features of violence, profanity and murder.

*Mr. Van Santvoord* cited *Ray's Medical Jurisprudence*, page 135, to show that insanity was not indicated so much by a change of feeling as a change of previous character. The natural character of the prisoner should have been shown, and she should have been judged sane unless there has been a departure from her usual manifestations. It was essential on the part of the defense, to show what her habits were, and that when the crime was committed she exhibited opposite and unnatural manifestations.

A man may suppose his leg is of glass, and on all other subjects be of perfectly sound mind. There is one such case reported. This is monomania; but monomania is no excuse for crime, unless it is proved that the subject of it was laboring under the particular delusion with which he may be afflicted, at the very moment of the commission of the act. Almost every one has his delusions on particular subjects, so that if you sift the thing down to its very elements, there is hardly a person to be found who is not, to some degree, insane.

The defense had introduced two or three witnesses to

show eccentricities, without proving they were different from usual manifestations, and without tracing them to any peculiarly existing causes. Senator Verplanck said, truly, that it will not do to attribute mere eccentricities to insanity, for under such a rule, even Paschal and Newton would have been deemed insane.

Dr. Bontecou has sworn that the prisoner was irrational, and Dr. Hegeman does not believe she possesses a sound mind. It was not necessary, he contended, to prove the woman of perfectly sound mind; "all men are insane sometimes in their lives;" but the question for the jury to determine, was—had this prisoner, at the time she committed the murder, sufficient rationality to distinguish between right and wrong?

He would not reflect in the slightest manner upon Dr. Bontecou; he acknowledged the propriety of the compliments which have been paid to him by Mr. Townsend; nevertheless, his testimony was but a bundle of opinions and conjectures, and such opinions and conjectures are not evidence. You cannot convict this woman without evidence; neither can you acquit her on mere opinion.

True knowledge and skill, he remarked, are proverbially modest. Sir Isaac Newton regarded himself as a mere child on the sea shore, but Dr. Hegeman, fresh from a university, with a year's practice, and a single insane patient, without any knowledge of the previous life, habits, or character of the prisoner, is relied upon as the chief witness to establish her insanity.

*Mr. Van Santvoord* here read authorities to show that a medical man of crude opinions and little experience is not competent to detect insanity—that Doctors Bontecou and Hegeman, under this rule, were not qualified to decide the question, inasmuch as they themselves acknowledged their almost entire want of experience in cases of this character. He read from Ray's Medical Jurisprudence to the effect that a physician may be well qualified in other practice, but no judge of insanity. Applying the rules of law which he had

read, he inquired what the opinions of Dr. Bontecon and Dr. Hegeman, on that subject, were worth.

He read from a work on medical jurisprudence, to the effect that it required the most careful examination by one of large experience in such cases, to detect insanity; and in this connection, reviewed at considerable length the positions assumed by Mr. Townsend. He pointed out the inconsistency of the defense. At one time they read authorities, he said, proving that monomaniac is reckless of time and circumstance in the commission of the crime; that the indiscriminate slaughter at Lanagan's proved her laboring under that form of disease. Again they refer you to her caution in secreting the poison under the carpet; the adroitness she displayed in mingling the arsenic with the sugar; and these exhibitions of cunning they also allege are evidences of insanity. If she is taciturn, they contend it indicates a mind deranged—if she is garrulous, it indicates the same; no matter whether she laughs, or cries, or dances, they have but one invariable conclusion. The same inference is drawn from every fact, though they be precisely the reverse of each other.

He next touched upon the question of moral insanity; referring to the case of Cline, tried before Judge Edmonds, wherein the judge laid down the novel doctrine that a person insane on one topic, should be relieved from responsibility, characterizing it as moral insanity. This theory was from the French school, and was not recognized in this country as of itself sufficient to shield the murderer from punishment. It was the first and only annunciation of that doctrine in an American court, and was made by a judge who has since become an advocate of spiritualism, and who wanders about the country discussing that absurd delusion. The legal rule is, "partial insanity is not a defense of crime," and in support of this proposition he cited the case of Lord Ferris, also that of Arnold, tried by Justice Tracy, and read from a charge of Chief Justice Gilson.

The old rule of common law in England was, that a man to be insane, must have no more reason than a brute. This doctrine was somewhat modified by Judge Hale, two hun-

dred years ago; still at the time of the committing of the act, the mind must be so entirely insane that the person is unconscious of right or wrong. Partial insanity does not excuse crime. That is substantially the rule to this day. Lord Onslow, he mentioned, was partially insane, and yet he was found guilty, as he had sufficient mind to form designs. Many other cases were cited to establish the position that if the person is possessed of knowledge to enable him to deliberate upon a plan with a view to commit crime, then he is responsible for such crime. Having fortified his legal proposition with these numerous references, he then entered into a lengthy examination of the testimony, and argued very skillfully and powerfully that Mrs. Robinson, when she mingled the arsenic with the sugar, was not so far the subject of mental hallucination, but that she was able to distinguish between right and wrong.

He then referred to the alleged causes of her insanity. It is claimed, said he, that the woman was laboring under a delusion arising from the interruption of an illegitimate intercourse with ———. He was sorry this gentleman's name had been brought into the case, contrary, as he understood, to the earnest wishes of the prisoner. The introduction of it in no way strengthens the defense, and he sincerely regretted it, because with him he had maintained friendly relations.

Now, suppose it is admitted that the woman was suffering under the hallucination that this gentleman would marry her! Admit she was running about the streets inquiring for him. The counsel referred to a number of instances and authorities to show that delirium of that nature was no excuse for crime. He ridiculed the idea of insanity from such cause. She is represented, he said, as the crazed Ophelia, but I tell you, gentlemen, that this woman who carries pistols in her bosom and drinks bad brandy, who indulges in profane and obscene language, as she did in the presense of Mary Dillon, would not be likely to go mad through love for ———, or any man. Up to the first of April, at least, she must have been sane, because it is demanding too much of our credulity to suppose that he would have lived with a crazy woman.

He next took the ground that the various freaks and eccentricities of the prisoner indicated intoxication rather than insanity. She staggered when Brownell first discovered her groping through the hall of the court house, and was not sober at the conclusion of their interview. She was in the daily habit of drinking beer and brandy, and the fact that she drank publicly in the grocery of Peter Cox, is abundant evidence that she used it to excess. She asked Anthony Goodspeed for game out of season. Is that proof of insanity? If it is, then I am insane, for I do not know the season of game. But she asked for it several times in the course of a few minutes. That can be regarded in no other light than the natural result of mental stupidity induced by intoxication. In this connection he examined in detail the testimony of Mary Dillon, contending that it proved the woman inebriated rather than insane.

There is one mania with which the woman is evidently possessed, and that is a mania for lying. She is not a person of veracity. At one moment she cut the dress herself, the next it was cut by a dressmaker. Sometimes she was educated in a nunnery, sometimes at Mrs. Willard's seminary. Now, she is the daughter of a lord and born in an Irish castle, and presently she is the offspring of a poor Irishman, and a native of Vermont. At one time the origin of her troubles was her marriage with a poor man, at another they are all attributed to the unkindness of a step-mother. During the day which Mary Dillon spent with her, her conversation generally was rational and agreeable, and these stories, instead of indicating insanity, I regard as the occasional breaking out of her natural propensity to lie. But there might have been some truth, he said, in the story of her mother's death. The tears she shed over the picture, let us trust, gentlemen, were honest tears. I do not believe there ever was a nature so entirely depraved but it still retained some hallowed recollections—some lingering affection for home and kindred. But then she laughed and danced, and for this reason you are told the prisoner was insane. On the contrary, how natural, how like womanhood it was. The picture of her dead mother



recalled the scenes of her childhood—the happy days of her innocence. No wonder the woman wept. The recollections of the past brought with them nothing but a sense of misery. And the frantic dancing and laughter, what were they but the strivings of a wicked heart to throw off the painful memories that oppressed it?

As to the evidence of her insanity as exhibited subsequent to the arrest. She did, indeed, exhibit some remarkable symptoms of nervous agitation, whether feigned or real it was unnecessary to inquire. In this there was nothing strange or singular; on the other hand, it was very natural. He could not conceive it possible for a woman of strong passions and ardent impulses, like the prisoner, to appear otherwise than wild and excited under such circumstances. Her desire not to be seen entering the jail with the police officers, was commented upon as indicating a natural and rational pride, and a sensible appreciation of her condition. He did not at all wonder that she became somewhat delirious after her incarceration, and attributed it to sudden abstinence from intoxicating drinks. This, together with the gnawings of a guilty conscience, were sufficient to account for all the delirious imaginations which the evidence had disclosed.

The question for the jury to determine, was not her condition subsequent to the arrest, but whether she possessed that knowledge which enabled her to distinguish between right and wrong at the time she administered the fatal poison to her victims. If you, gentlemen, are satisfied, he concluded, that this woman was a responsible and accountable being, when she murdered Timothy Lanagan and Catherine Lube, it is your duty, however painful it may be, to pronounce her guilty. Poor and rich, great and small, male and female, are alike amenable to the law. You are only to take into account the evidence, without regard to the sex of the prisoner, or the lowly condition of those she murdered. They were poor and unpretending, it is true, but laws are made for the protection of the weak. The idea sought to be impressed upon your minds, that because the prisoner at the bar is a woman, she cannot therefore be guilty, is fallacious. You recollect the

trials of Mrs. Whipple and Polly Bodine, and numerous other instances where females have been guilty of the horrid crime of murder. It sometimes happens, however, that the jury bring in, with their verdict of guilty, a recommendation to mercy. I have no objections to your pursuing a like course in this case, if you think proper. The court, likewise, may possibly join in a request to the governor for a commutation of punishment. If she receives this favor, which is probable, she may deem herself most fortunate. If she does not, then, like others similarly circumstanced, she can only direct her prayers on high, and seek for mercy at the tribunal of Omnipotence.

*May 27.*

MR. PIERSON FOR THE PRISONER.

*Mr. Pierson* commenced by saying that the cause had been so well discussed by his associate, Mr. Townsend, that there was little left for him to say; the subject was exhausted. As for himself, the imaginative fervor of his youth, if, indeed, he had ever had much, had disappeared with his advancing years. What little reputation he might possess as a lawyer had been obtained, not by sophistical argument or oratorical display, but by an honest endeavor to present the claims of his clients in a plain, frank and truthful manner. He complained of the injustice, he might add, the cruelty, of the prosecution, who, in their professional zeal, had evidently labored, throughout the whole examination, to secure for themselves a triumph, by obtaining the conviction of the prisoner, whether right or wrong. Such a victory might be flattering to professional pride, but it was outrageous to seek it at the expense of justice and the sacrifice of life.

There were two grounds upon which he should contend for the acquittal of the prisoner:

First—There is not sufficient evidence to establish the fact that she committed the murder.

Second—If you find that she did commit the murder, then I contend that it has been clearly shown that she was insane at the time, and is therefore not responsible for the act.

In support of the first proposition, he called the attention of the jury to the fact that there was no proof whatever fastening the commission of the crime upon the prisoner, except what was found in the testimony of Mrs. Lanagan. It was true, she had previously purchased arsenic at Ostrom's drug store, but that was nothing more than is done by hundreds of others every day. Because a person buys arsenic, and has it in his house, we must not infer it is his intention to commit murder. Arsenic is an article used generally, and for a great variety of commendable and innocent purposes. The presumption is that Mrs. Robinson stated the truth when she said she wanted it to destroy rats, and this presumption is enhanced by the fact that the locality of her dwelling by the river was such as to render it very certain that she was much annoyed by them.

The mere fact, then, that she purchased arsenic and had it in her house, was without any weight whatever. To carry the conviction to your minds that she is guilty of the crime, it will be necessary for the prosecution to produce some evidence, either positive or circumstantial, that she had poison in her possession at the time she entered the grocery of Lanagan. This, however, does not appear. Mrs. Lanagan does not testify to anything of the kind. She saw a white paper in her hand, but whether it contained anything, and if so what it was, no one pretends to be informed.

If Mrs. Lanagan had been on trial instead of Mrs. Robinson, could not the prosecution, by pressing the fact that she procured the sugar, drew the beer, poured it into the tumblers, and finally refused to drink it when prepared, have made out a clearer and a stronger case against her than they have against this prisoner? They could also have urged the fact that Mrs. Robinson's repeated and unwelcome visits had become annoying, so much so, indeed, that she had been forcibly expelled from the house, and frequently ordered to remain away from the premises, as a motive on her part to rid herself effectually of her presence, far more plausible than any theory they have advanced in the course of this trial.

As to Mrs. Robinson, there stands the fact, still unrefuted

by evidence or argument, that there was no motive that could have actuated her in the perpetration of the offense. He combated the position of the counsel who had preceded him, that it was unnecessary to prove a motive and contended that all precedent and authority established the doctrine that in order to secure the conviction of a sane criminal, such proof was essential.

Allusion had been made to the case of Green, convicted of murder in that same court house, a few years previously. Green certainly had a motive. He had seen an actress dressed upon the stage in a very attractive manner—conceived a sudden passion for her, and married her. She was beautiful, indeed, but he soon found that all that glitters is not gold, and that she was not such a wife as he desired. He had previously paid attentions to another lady, possessed of property. This would aid him in business, and, actuated by this motive, he murdered his wife in order to marry her. These were the real facts of the case, with the addition that the evidence of his having poisoned his wife, was overwhelming.

He also reviewed the case of Phelps, who was tried in that court house. Phelps was acquitted, and acquitted, moreover on the very ground upon which we demand the acquittal of the prisoner at the bar. No adequate motive was shown—but as much as has been shown in this case—and consequently he was discharged.

He contended that it was incumbent on the people to prove one of two facts, in order to secure conviction—either a motive for the deed, or that she was intoxicated at the time it was committed—and insisted that neither had been shown.

*Mr. Pierson* referred to the case of *People v. Pine* (2 Barbour 566), wherein five different stages of insanity are recognized, and also to the decision of Judge Edmonds, which had been so severely criticized by Mr. Van Santvoord. Dean, in his valuable work on medical jurisprudence, had characterized that decision as “judicious.” But we are told that Judge Edmonds is a spiritualist. Great minds, however, sometimes embrace the humbugs of the day. Notwithstanding Judge Edmonds’ peculiar sentiments in regard to invisible

spirits, his legal opinions had been highly respected for years. They were sound opinions, and all the ingenuity of the gentleman could not discredit them. The *Lispenard* case (26 Wendell) had been relied upon by the prosecution. The court for the correction of errors, it was true, had reversed the decision of the inferior court, pronouncing the party sane who made the will. It was well understood, however, that the decision was lobbied through the court, and he declared that he never could hear an allusion to that case without emotions of indignation. It was there decided that a person gross in habit, who drank to excess, who could neither read nor write, and who was, in fact, a perfect and absolute idiot, was, nevertheless capable of making a will. In an ejectment suit, however, brought afterward, the will was virtually invalidated. So much for that case, and the remark thereon by Senator Verplanck as quoted by opposing counsel.

He then read from Ray, page 460, the case of *Drew*, decided in the United States circuit court, before Justice Story, wherein it is held that if a person's mind becomes permanently impaired by a long course of intoxication, he is not responsible. *Drew* was arrested and tried for the murder of one Clark. After sudden absence from drink he had exhibited evidences of mania; had no appetite, and raved and swore. For weeks after his arrest, these exhibitions continued. The coincidence between that case and this, he dwelt upon as most striking and remarkable. They presented the same evidences of insanity in every respect, yet *Drew* was acquitted, Justice Story deciding that if the insanity was produced remotely by the influence of liquor, it furnished sufficient ground for releasing him from responsibility.

*Mr. Pierson* then read some passages from the indictment, charging Mrs. Robinson with willfully, maliciously, not having the fear of God before her eyes, and instigated by the devil, poisoning Timothy Lanagan, etc. The indictment, he said, was founded on the assumption that the crime was committed in the manner alleged; that it was the result of a willful, malicious, premeditated design. The prosecution, therefore, in order to sustain it, were obliged to show that she

planned the murder deliberately. There was no evidence to that effect. If she did mingle the poison with the sugar, would any unprejudiced person believe that it was a pre-conceived act; that she comprehended what she was doing at the time?

He criticized the testimony of Drs. Adams and Skilton, alleging that a great deal of it amounted to nothing. Neither of them analyzed the contents found in the stomachs of the deceased, and all authority, as well as common sense, demanded the test of an intelligent analysis, before the expression of an opinion, as to the cause of death, was deserving a particle of credit or attention. Dr. Skilton, forsooth, was gifted with that extraordinary and miraculous intuitive perception that, judging from symptoms only, he felt he could not be mistaken, while men of the highest scientific and medical attainments could only arrive at a satisfactory conclusion after skillful chemical tests.

He then referred to the expressions of Lanagan on his death bed, and said there was something incomprehensible and mysterious about them; something that seemed to indicate that he was aware of the agency of another and an unknown person in the accomplishment of the murder. You remember, gentlemen, how he exclaimed, "The villain has killed me!" Who ever heard such an epithet applied to a woman? If he supposed Mrs. Robinson had done it would he not have said, "The woman has killed me?" Writhing in the bitter agonies of death he was unable to explain the enigmatical expression. The lips of the murdered man are stamped with the seal of eternal silence, and who shall say that the true secret of this whole affair is not buried with him in the grave!

But there was another point, utterly irreconcilable with the idea of sanity, provided it was found that she committed the act. What would a criminal be likely to do, he inquired, after the commission of such a crime? All precedent, all criminal history teaches us, that she would have fled—have hastened from the dreadful scene, and sought to have concealed herself from the eyes of men. On the contrary, she returned to Lanagan's within two hours after the beer was

drank, perfectly indifferent and evidently unconscious of having committed wrong. This conduct can only be accounted for upon the hypothesis that she was insane or innocent. "The wicked flee when no man pursueth, but the righteous are as bold as a lion."

In further exposition of his views upon the question of insanity, he read from Guy, page 343, applying to the authority quoted the testimony of the druggist Ostrom and the policeman Burns. He also expressed his surprise that the prosecution had not called a single person to rebut the evidence of insanity; had not even examined Dr. Adams upon the point, who was physician to the jail six months after her arrest, and who could have established her sanity if such was the fact. No such evidence was offered for the simple reason that there was none to offer, but on the contrary, the eloquent counsel who had preceded him, was driven to admit that her conduct in jail was truly unaccountable. For weeks she was irrational and raving. Dr. Hegeman tells you that even now, though much improved, he does not regard her of sound mind. During this time she was deprived of stimulating drinks, and, of course, could not be under their influence. How, then, is this unaccountable conduct to be explained, unless we attribute it to the true cause; which, I am confident, you will concur with me in the conclusion, was neither more nor less than the eccentric actions and distempered fancies of a maniac.

*Mr. Pierson* then entered upon a general description of her conduct, pointing out numerous evidences of a deranged intellect, such as the story of her husband being injured by the cars—the fact that she denounced the attempt to prove her insane—her demeanor at Center Market—the strange idea that her house was surrounded by a mob—the carrying of pistols to defend herself against attack—the crazy fancy of the wonderful cork, and the still more crazy fancy of the cauldron of boiling water—all these, and other facts of similar character, were discussed at length, and eloquently.

And now my lips are about to close. I shall be followed by a gentleman distinguished for his ability as a lawyer, and who is skillful and ingenious in argument. He feels that his repu-

tation is at stake and will spare no effort to wring from you the verdict of conviction. But, relying upon the strength and justice of our defense, and feeling that "truth is mighty and must prevail," I submit, with all confidence, into your hands, gentlemen, the life of this truly to be pitied and most unfortunate lunatic.

*Mr. Townsend* directed the attention of the court to an article in the *Troy Daily Whig*, alleging that the defense had changed its tactics at the time *Mr. Brownell* was called, which had resulted in bringing out prominently the name of a person as having had relations with the prisoner prior to the commission of the crime. He said there had been no change of tactics. On the contrary, the counsel for the prisoner would have been recreant to duty, had they failed to have elicited this testimony, which they considered of great importance to their client. It had been suggested that this evidence had been called for at the request of the prisoner. He begged leave to say that the prisoner, on the contrary, had insisted that the testimony should be suppressed; but in view of its importance, her counsel had felt called upon to put it into the case.

#### MR. HOGEBOOM FOR THE PEOPLE.

*Mr. Hogeboom* said that he should endeavor to confine his attention to the case. He should not attempt to enlist their sympathies, or excite their indignation. He should ask them to convict the prisoner, but he should do so, because he believed that the evidence imperatively demanded it at their hands.

*Mrs. Robinson* stands indicted for the murder of *Timothy Lanagan*, on the 25th of May last. It will be your business to inquire, first, whether death took place as alleged in the indictment; second, whether it was from the effect of poison; third, who administered that poison, and, fourth, whether the party who administered it is responsible for the crime.

The investigation we have made has rendered it certain that the death was produced by arsenic. That point is not litigated. Two persons, *Timothy Lanagan* and *Catherine Lube*, on the fatal 25th of May, 1853, were poisoned, sickened and died.

Who administered that poison? Neither of the two persons who died at that time committed suicide. That is not



pretended. Who, then, caused their deaths? It is your duty to ascertain, in order that the offender may be punished, for the life of every citizen, however humble his position, is entitled to the protection of law; and you cannot hesitate under your oaths, if the evidence requires it, to consign this prisoner—this woman—to an ignominious death, to satisfy the law. Did Mrs. Lanagan administer the poison? The counsel for the defense have endeavored to impress it upon your minds that she did. Is there a shadow of evidence to show it? Is there the least surmise that domestic discord had been sown in the family? that there was any jealousy existing? that Mrs. Lanagan entertained the slightest suspicion of an illicit intercourse between her husband and the girl? that there was any undue intimacy between him and Mrs. Robinson? Not a particle of proof to show it—nothing whatever, directly or remotely, to justify the idea.

We must look elsewhere if we would trace to its true source the origin of the poisoning. The evidence points to the prisoner at the bar. You are required to have reasonable evidence. Such evidence you have had. Either sane or insane, there sits the woman who committed the murder.

I repeat, the evidence points directly to this prisoner as the individual who administered the poison. Early on the morning of the 25th, she took the initiatory step, by purchasing a quantity of beer, in order that its intoxicating qualities might brace her mind to the commission of the dreadful act. During the day she was laboring under its influence; for who pretends that the quart of beer, which she purchased, was drank by any other person than herself; and who denies that a quart of beer is sufficient to intoxicate? She goes home, but returns directly, for the purpose of borrowing money and is refused. Again she returns at eleven o'clock, in a reckless, half intoxicated state; stalks into the back room, into a drinking place, and imbibes, perhaps, again. The "fascinating lady"—the only female there, among a lot of loungers—is soon indulging in rough and boisterous conversation. The proprietors interfere, and she is ordered home. Do you imagine, gentlemen, that this vile-tempered woman, who had

drank a quart of beer before eleven o'clock—who had been refused a paltry loan—who was ready to quarrel with the men in the back room—who was ordered away from the premises—did not brood over these affronts—these “insults?” Two hours afterward, before her anger had time to cool, she returns once more, and then occurs the fatal scene. We have one credible witness of the facts. All the others present at the time are dead. That witness describes to you the particulars of the occurrence, in a plain, simple, and unequivocal manner. Mrs. Robinson enters the back room, with a white paper in her hand—seats herself at the dinner table, and insists that Mrs. Lanagan and Miss Lubees shall drink beer with her. She declines drinking herself, and consequently but two tumblers are filled; she calls for sugar; it is handed her in a saucer; she walks to and fro with it, during which time, of course, her back is turned to the girl; and then she mixes it with the beer. A slight foam is discovered on the surface; Mrs. Lanagan is about removing it; she is stopped by the prisoner, who gives utterance to the significant expression that “that is the best of it.” The unsuspecting victims partake of it—the fatal poison is imbibed, and without another word, the murderess retires; her object is accomplished.

But it is asked, what possible object could Mrs. Robinson have in poisoning Miss Lubees? You will bear in mind that the sugar was all brought in on one dish. It was not in separate parcels, and it was necessary that the poison should be mingled with the entire quantity of sugar before it could be safely conveyed to the beer. If she had only poured it into one tumbler, the act would have excited suspicion at once, and no doubt frustrated her design. Whether there was or was not, therefore, any animosity existing between the prisoner and the girl, it became necessary, under the circumstances, in order to carry out the main purpose, to communicate the poison to both glasses. It was done also, beyond question, to destroy the evidence of guilt, to close forever the mouths of witnesses who, if living, might testify against her. Unexpectedly, Mrs. Lanagan left the room;

and in the emergency of this unforeseen frustration of a portion of her plan, it became necessary to her security to silence the girl who had been throughout an observer of the scene. She called to Mrs. Lanagan, but she did not go back into the room. Undoubtedly it was the intention of the murderess to destroy every member of the family, and for the life she is now enjoying, Mrs. Lanagan is indebted to a fortunate accident, and not to the mercy of the veiled prisoner at the bar.

As to who was the real author of the crime, there can be no serious question. Mrs. Lanagan proves there was no arsenic in her house. On the other hand, Mrs. Robinson had the means—was in possession of the poison, and was, therefore, prepared to perpetrate the deed. Mrs. Lanagan did not drink, because she was called away. Mrs. Robinson was not called away, and still she did not drink. Soon after, she was ready to drink at the counter; why did she refrain on this occasion?

Now let us look at the question of motive. If I step into that jury box, and, in the presence of the thousands here assembled, plunge a dagger into the heart of any one of you, we are gravely told that the people must prove a motive in order to convict me of the crime! A motive, no doubt, must exist, but we are not required to prove it. It is sufficient for us to show the commission of the act. If you are assaulted by a neighbor, without any provocation of which you are aware, can it be held necessary for you to prove a motive, in order to obtain redress. No, gentlemen, the rule applicable to murder or any other crime is, that the motive is inferred from the act. Nevertheless, it is very proper to go into an inquiry for motives, but this is generally done to fix the crime in those cases which are involved in doubt. Where the deed is perpetrated at noonday, the act itself furnishes sufficient evidence of the existence of a motive.

There would be no safety, he contended, but in the maintenance of this rule. It would be impossible to secure the punishment of crime, in nine cases out of ten, under a different principle. How can I tell what is passing through your thoughts? Human intellect is inadequate to penetrate the

heart of the criminal, and comprehend the secret motives that actuate him, and the law does not require it. What do we know of the character of the prisoner, but from her actions, as developed by the evidence in this case. We only know that her conduct and habits were gross and irregular and foreign to the delicacy that should characterize her sex. What may not a woman of such character do?

But I think the relations existing between her and the Lanagans, furnish us with a sufficient motive. There had been difficulty between them. There was the difficulty at the dance. You remember she drew her pistol and threatened to blow out the brains of Smith. She was persuaded to go home, but immediately returned, still raging and unappeased. All this evidence shows the stuff she is made of—that she is a being of uncontrollable passions and imperious temper—a person of desperate and depraved character. If she was ever otherwise, she has fallen. Her quick resentment of fancied or real insult—her whole bearing toward those with whom, in her low condition, she was compelled to associate, exhibits a haughty spirit of contempt. Doubtless, as she mingled with the uncongenial company at the Irish dance, the recollections and associations of a more refined life crowded upon her mind, and left something of the spirit of high-born woman lingering about her still. The next morning she called again, and demanded of Mrs. Lanagan, why she had suffered her to be insulted in her house the night before. A quarrel ensued; she is told her custom is not wanted, and is ordered off by Lanagan. Would not a passionate, resentful woman like her be apt to brood bitterly over such an affront?

The matter of borrowing money may, likewise, have had something to do with the murder. We know not motives, but we can infer this from acts. She had borrowed money frequently at Lanagan's. The last time she applied she was refused. That refusal, in all probability, was smarting in her bosom. "What," it is likely she may have thought, "am I to be denied the loan of the paltry sum of two dollars by these Irish people? I will have revenge."

Again, at eleven o'clock, she is with the men in the back room. The proprietors remind her that her behavior is indelicate. That was a reproof which we may be very certain rankled in the bosom of the proud and fiery woman. All these things—the burning sense of her condition—the apprehension of desertion—the contempt for her associates—the supposed insults she had received, it can readily be conceived, contributed the motive of the crime.

The facts, then, gentlemen, are these: the prisoner is guilty of the murder, and the motives that actuated it are apparent. Life has been taken—law has been trampled under foot—and unless you find the woman is insane and irresponsible, the violated statutes of the land demand that she shall suffer death.

I shall now examine the testimony and the authorities relative to insanity. If you can bring your minds to the belief, that in consequence of a deranged intellect, she was incapable of distinguishing between right and wrong, when she committed the murder, then acquit her—say she is innocent—say she is guiltless. But if you believe the testimony as regards her insanity is weak and trifling—that it is only a shallow conceit to deceive you into a verdict of acquittal—is but a part of the mystery in which this case is attempted to be veiled—then I call on you, as the representatives of the people, to stand firmly by the law, and to render a fearless and righteous judgment.

As to her insanity I would endeavor to ascertain the true mental condition of the person both before and after the murder, though we contend that her condition after, was of no importance, farther than it might throw light on her state of mind prior to, and at the time of, the commission of the offense. After her arrest—after being charged with, and imprisoned for the crime—there was, of course, a motive for feigning insanity. She knew it was her only avenue of escape. It was an all-important object to be gained—the prize was her life—and therefore, it behooved her “to act well her part.” Now, the idea had been advanced, that insanity could not be feigned. A brief reference to a few authorities

would be sufficient to explode that notion. In Guy, page 242, it was maintained, in substance, that it is only familiarity with real insanity, by which the feigned can be detected; page 344, that in feigned monomania, the imposter is apt to overact his part, especially on the approach of visitors and physicians; page 348, it was held that it requires knowledge of previous character and habits to distinguish the real from the feigned. These authorities prove that the question of feigned insanity was more difficult to solve than the prisoner's counsel had seemed to suppose. Before the manifestation of monomania at the jail, numerous persons had called on her. I would not say that an honorable man would advise her to such a course, but it would require only a very remote suggestion to impress on her artful mind, that it was necessary for her escape to manifest these symptoms of insanity.

Again, the prisoner being a high-strung woman, it was natural that she should betray emotion and nervous agitation under the pressure of the terrible charge of murder. That she was also addicted to the use of liquor there was no doubt. Of this, there was abundant evidence. Ostrom, Brownell, Mrs. Lanagan, Peter Cox and Mary Dillon, show in their testimony that she was in the habit of using ardent spirits immoderately—intemperately. What would be the effect of sudden abstinence? Just such symptoms as she manifested in jail. In this manner, therefore, we may reasonably account for her singular conduct.

The prisoner is now before you, a sane and responsible woman. What cause has supervened to effect her cure, to restore her to reason. She is in the most trying position in which it is possible for a woman to be placed, and yet it is not denied that she is now sane. During the time it is alleged she was insane, the defense failed to bring on her trial. Why? Because, then it would have been necessary to have gone into a preliminary examination, and if proved insane, she would have been sent to a lunatic asylum. That, she wished to avoid, as well as the contingency of a failure, in which case she would have been declared responsible for the crime charged against her.

The opinions of Dr. Bontecou were mere opinions. It is not fit that they should be taken on trust. Opinions are cheap—very cheap—they cost nothing. Facts only are valuable and reliable—facts founded on the truth. Dr. Bontecou, indeed, does not profess to have much knowledge on the subject; has had no education with reference to it—has read no standard works that treated of it. You, of course, remarked, the doctor refused to employ any other word than that the prisoner was “irrational.” He declined using that suggestive term, insane. It is quite true, her conduct might not have been rational; the act of murder, in every aspect, is irrational. The woman’s recklessness was irrational. But insanity is another thing. The doctor did not say she was so insane as to relieve her from responsibility. He only discovered some peculiarities that looked irrational; for instance, on the occasion of his second visit, the prisoner had on a loose habit—a loose dress—(I wish it were her only loose habit). You will recollect that when I asked him why he visited a crazy woman two or three times a week, his answer was not responsive. But, because Mrs. Robinson’s answers to his questions were not responsive, he pronounced her irrational. According to the doctor’s theory, he is, himself, just as crazy as the prisoner. The fact is, it is evident enough, that it was not until after three weeks incubation, during the time the doctor visited the jail, that this idea of insanity was hatched out.

*Mr. Hogeboom* proceeded to examine, in detail, the testimony of Dr. Hegeman. It had been relied on, he said, to prove the prisoner’s insanity. He read that portion of it elicited from him by the defense, when called a second time. The prisoner, according to Dr. Hegeman, fancied that people were grinding knives to kill her, and that a man and woman were boiling a cauldron of water, in which to scald her. He read from a medical authority to show that these fancies were indications only of temporary delirium, to be ascribed to high febrile action, naturally resulting from the circumstances which had previously occurred, and did not at all relieve her from the responsibility of former acts. Conceding

that they were the symptoms of delirium tremens, there is no evidence, not the least, that she was laboring under that disease on the 25th of May. No such pretense is made; indeed, the defense go so far as to deny that she even indulged in the habitual use of intoxicating drinks.

He then alluded to the destruction of the chairs. She did not, however, compromise her comfort, by destroying the rocking chair—she was very careful not to do that. Throughout, in fact, there was an extraordinary method in the woman's madness, which entitled it to the most careful and suspicious attention. Then, of course, Dr. Hegeman, like Dr. Bontecou, had to bring in the funeral scene, in which Mrs. Robinson is solemnly informed that the bodies of the murdered people were being carried to their graves. Certainly, it was her policy not to be startled or excited. It was necessary, when thus accosted, in order to carry out her design successfully, to feign entire ignorance of, and indifference to, the subject.

To establish the allegation of insanity, the defense had introduced but two professional witnesses, neither of whom claimed to possess but little knowledge of the disease—neither of whom pretends to that familiarity with it which, according to the medical authority I have read, renders them competent to inform us whether her insanity is feigned or real. One of them, indeed, finds the office of deputy sheriff and jailer more congenial and profitable than the practice of medicine. I cannot think, gentlemen, that you will hazard a verdict upon the evidence of such witnesses. So much for the medical portion of the defense.

He then referred to Mr. Jennyss and remarked that, situated as that witness was, he would have kept away, had he consulted his own sense of propriety. He also alluded to the trick played by the prisoner upon the grand jury; commented on the futile efforts that had been made to induce her to unveil her face, and reflected with severity upon the stubborn manner in which she had attempted to involve her origin—her history—as the counsel had her cause—in impenetrable mystery.



*Mr. Hogeboom* proceeded to comment at length on the condition of the prisoner's mind prior to the murder. It was strange, he said, that the defense did not give them some of her antecedents, so that they might judge whether the disease was, or was not, hereditary; and whether her subsequent conduct has been inconsistent with her previous character and habits of life. If it is a fact that she was insane before the murder, he accounted it as marvelous, that no witness but *Mary Dillon*, a young, inexperienced girl, of immature judgment, should be called to prove it, especially as it is shown that she has resided here for years. Her history could have been safely confided to her counsel; but it is intimated that there is some mysterious thing connected with the case that prevents any inquiry as to her antecedents.

He then analyzed the girl's testimony and argued that the prisoner's large stories were no evidence of insanity. She said *Oliver Boutwell* had stopped the navigation of the *Hudson* river. That sounded wild—nevertheless it was a fact; at least, there was more truth than insanity in the remark. *Boutwell's* evidence, wherein he states that the water from his mill drove the vessels out upon the rocks, and prevented a safe passage through the locks, explains it all.

Then, in regard to her being educated at the seminary—is that statement strange? is it evidence of insanity? It is just as reasonable as the statement in *Mrs. Willard's* card, that because *Mrs. Robinson* refused to see her, it was not possible she was educated at the seminary.

And is it remarkable that she stated that she could swim? Who knows that she cannot swim? Is it very common, indeed, for English ladies to understand that art?

And then her conversation about what a glorious soldier she would make—is it not natural that an energetic, half masculine woman, depraved as she was, going about the streets with a revolver in her bosom, should indulge in just such kind of brag? Used as she was to firearms, is it not possible she was as good a shot as any of you?

Then, again, her talk about being insulted—is it at all strange that one in her circumstances—pursuing her mode of

life—associating and bandying epithets with rowdies—should talk of insult, and of invoking the aid of the police?

He did not deem it necessary to pay much attention to the woman's frivolities, at Center Market, as observed by the witness Goodspeed. Her irregular life, reckless character, fiery passions—all were natural to such behavior. The evidence of Knickerbocker was that she supposed she was followed by him. Her conduct was in harmony with her character. She acted like a high-bred, but fallen and desperate woman. Drawing her pistol, and presenting it at his breast, she told him to depart. The young man left. I venture to remark, he followed her no farther.

He discovered no impropriety in the remarks of the *Whig*, that the defense had changed their tactics in introducing Mr. Brownell's testimony, which brought the name of a gentleman out in connection with the woman. He admitted, however, that the movement was a puzzler to him at the time. If it was designed to influence the action of the prosecution, the object had failed. The design was, probably, to surround the cause with still more mystery; and, perhaps, to touch a point with some juror. However this may be, I have confidence that you will do, in this case, your duty, uninfluenced by all such extraneous matters.

I do not believe that this woman will ever die with love. She is unlike the lady described by Shakespeare, who

"never told her love,  
But let concealment like a worm i' the bud  
Feed on her damask cheek. Who pined in thought:  
And, with a green and sickly melancholy,  
Sat like Patience on a monument,  
Smiling at Grief."

There is no evidence that she loved distractedly; she may, indeed, have felt herself wronged and outraged; she may have been grieved and indignant; but even assuming her to be wild on that particular subject, is it pretended that she was insane on all subjects, so as to relieve her from responsibility for crime? It cannot be. This phase of the case has been introduced to carry out the humbug of pretended in-

sanity, but I trust that neither his name nor his associations will have any effect with you.

Every one is presumed to be in the possession of a reasonable mind, and is held responsible in law for crime committed. Where is the witness who has testified that prior to the 25th of May, 1853, this woman was insane? Not one; there is no proof nor pretense that it was so. Every person has peculiar idiosyncracies. It is impossible to prove insanity without a knowledge of previous character, for the reason that there is no standard by which human conduct can be guaged. No two persons are precisely similar in appearance; no two minds are exactly alike.

Everything relative to the perpetration of this crime evinced design, planning, forethought, deliberation. It is said the poison was purchased for the purpose of destroying rats, and the counsel presume her house was infested by them, because it stood on the bank of the river. If such was the fact, how very easily it might have been proved. No, no; it was doubtless purchased of Ostrom under this excuse, to blind his eyes as to her real object. But we are asked, why she did not flee when the murder was accomplished? For the palpable reason that she wanted to conceal her guilt, and sudden flight would have been the strongest evidence of it.

I have only to say in conclusion, gentlemen, if, notwithstanding what appears to me the inexcusable guilt of the prisoner, you believe her to be insane, or in your minds there is a reasonable doubt upon the subject, it is your duty to give her the benefit of that doubt, and to return a verdict of acquittal. But you should look carefully and considerately into the case. Remember that partial aberration of mind in regard to other objects will not excuse her. Intoxication will not excuse her. The mystery which has been thrown around the case should not excuse her. I know how sympathy is apt to be excited in cases of this character, and especially in behalf of a woman, however fallen. But the jury box is the throne of justice, not of mercy. No matter how delicate the sex, how high the origin of the accused, if she is guilty, let her be so declared. Among us, crime goes not

unpunished; elsewhere, there have been melancholy instances where wealth and social distinction have secured immunity to the criminal. You have, truly, gentlemen, a most solemn duty to discharge. Two persons in this community have been slain by the prisoner at the bar. In the light of the evidence, I feel authorized in saying that the crime was perpetrated deliberately and willfully, and with a full and perfect knowledge of its enormity. You are now to determine whether she shall answer for it with her life. If you think our laws are worth maintaining—if you believe murder should not go unpunished, it is easy to anticipate your verdict. But if justice must be defeated by an unfounded and shallow pretense, or the clearest of human evidence is of no avail in a court of law—if sympathy for the distress of the living criminal before you, shall cause you to forget the agonies of the dead, then give the blood-stained murderess a certificate of innocence, and let her depart in peace.

#### THE JUDGE'S CHARGE.

JUDGE HARRIS. Gentlemen of the jury: The scene which during the week has occupied your attention with such painful interest, is at length drawing to a close. Happily, it is rare that the citizen, in the discharge of the duties which he owes to the government under which he lives, is called upon to act under responsibilities like those which now devolve upon you. It is but once, perhaps, in the course of a man's existence, that he is called upon to decide the fate, for life or death, of a fellow being—when, in the impressive language of the ceremony which initiated you into your office as jurors, the life of a fellow creature is given in charge to twelve men. The prerogative to determine life belongs to the great source of life itself. It is the highest power that man, himself the subject of mortality, can exercise, to assume this prerogative, and declare the life of his fellow man forfeited. This fearful responsibility now rests upon you. When you entered that sacred place, you, each for himself, took a vow upon yourselves that you would render a true verdict according to the evidence, even though the effect of

that verdict should be to take the life of the accused. That obligation you are now to meet; let it be so-met that a peaceful conscience may attend the abiding recollections of this hour, and, whatever may be the fate of this unhappy woman, that you may ever possess the conscious assurance that the laws under which you live, and from which we all receive protection, have been faithfully upheld and impartially administered.

With the policy or wisdom of the law which demands life as the penalty of crime, neither you, as a jury, nor we, as a court, have anything to do. Were we sitting as legislators, it might become us to express our opinion on this subject; but placed here, as we are, to administer the law, it is our duty to take it as we find it. The responsibility of taking human life is not upon us, but upon the lawgiver.

I proceed now, as briefly as I may, to invite your attention to the questions which will demand your anxious consideration, and the prominent points of the testimony bearing upon those questions.

Timothy Lanagan died on the 25th of May, 1853; he died of poison; was this poison administered by the accused? This is the first question which will require your attention. If the evidence fails to satisfy you of this fact, your duty will here terminate. You will pronounce your verdict of acquittal without reference to the other questions in the case.

But I have not understood the counsel for the defense as contending that the evidence justifies such a conclusion. The accused was in possession of the article which, upon the *post mortem* examination, was found in the stomach of Lanagan. Some ten days or a fortnight before, she had purchased of Mr. Ostrom, the druggist, two ounces of arsenic. About one o'clock on the day of the death, she went into Lanagan's house, where she found the family, Lanagan, his wife and Catherine Lube, at dinner. She sat down, upon invitation, to eat an egeg and a potato. Soon after Lanagan left the table and went into the grocery in the front room of the house. The accused then proposed to Mrs. Lanagan and

Miss Lube, to use the expression of the witness herself, that they should drink beer from her. They at first declined, but being urged, they at length consented. She then proposed, in order to make the beer more palatable, to put sugar in it, and requested Mrs. Lanagan to procure it. Mrs. Lanagan yielding to her request, procured from the grocery some fine white sugar in a saucer. She then went back to get the beer, leaving the accused and Miss Lube in the room. When she returned, she found the accused walking the room with the saucer of sugar in her hand, and she also says she observed that she held in her thumb and finger a small white paper, folded. Two glasses were provided and the beer poured out. There was not enough to fill them. The accused insisted that they should be full. Mrs. Lanagan returned to the grocery for more beer. When she returned, the accused was putting the sugar into the glasses. They were filled, and Mrs. Lanagan and Miss Lube sat down at the table to drink. Mrs. Lanagan says she observed, upon the surface of the beer, a white scum, and thinking it might be dust that had fallen upon the sugar while standing in an open box in the store, she took a teaspoon to remove it—that while in the act of doing so, the accused, who was standing by, arrested her hand and took the teaspoon from her, saying, that was the best part of it, and that it would do her good. At that moment Mrs. Lanagan was called to the grocery by her husband. She remained there, but her husband came, and he and Miss Lube drank the beer. He died at seven o'clock the same evening, and Miss Lube died at four o'clock the next morning.

This branch of the case depends entirely upon the testimony of Mrs. Lanagan. From the nature of the case, there could be no other evidence. Had she imbibed the fatal draught instead of her husband, as was at first intended, there would have been no one left to detail the circumstances. The credibility of Mrs. Lanagan has not been questioned. If her story is to be believed, it would seem to leave no room for doubt. You cannot hesitate, however painful it may be, to come to the conclusion that it was the accused,

and no one else, who administered the arsenic which produced the death of Lanagan.

Assuming that your minds will be brought to this conclusion, I proceed to bring your attention to another important inquiry—an inquiry which, from its very nature, is far more difficult. That inquiry is, whether, at the time she committed the act, the accused was in a condition to render her legally responsible for crime—and this depends upon the question whether, at the time, she was in a state of mind which enabled her to know that what she did was wrong. If at the moment of mingling that cup she knew that she was doing wrong, and deserved to be punished for it, then, whatever else there may be in the case, before the law she is answerable for the act as a crime. The evidence of her conduct and state of mind before and after is of no importance, except as it reflects light upon her condition at the fatal hour when she committed the deed for which she is now before you to answer.

It seems that, about the period in question, the accused had indulged very freely in the use of intoxicating drink. Mr. Ostrom says, that when she was at his store on Saturday evening, which must have been the 21st of May, she was quite intoxicated. Mr. Brownell says that when she came to his office in the early part of May, he thought her the worse for liquor. Mr. Cox says she frequently purchased liquor at his store, sometimes taking it there, and sometimes taking it home with her. Mrs. Lanagan says that, early in the morning of the 25th of May, she came to the grocery and procured a quart of beer, which she took home with her; and as the deceased was living alone, it may be presumed that she applied it to her own use. At eight o'clock she sent old Mr. Haley to borrow two dollars of Mrs. Lanagan, and before he left she came herself. About eleven o'clock she was there again. It is not proved that she drank then, but she went into the room back of the grocery, where there were several men, and engaged in noisy, boisterous conversation. The fact that she was found in such a place, and in such company, furnishes some ground for the belief that she

was then under the influence of liquor. Mrs. Lanagan says, that perceiving the noise, she went into the room and told her to go home—that it was no place for her to be there among such a set of men. At one o'clock she came again, and then the poison was mingled with the beer. Shortly after she left, she sent Haley for Mrs. Lanagan to come to her house. It is the theory of the prosecution, that having failed in procuring Mrs. Lanagan to drink the poison, it was her object to get her over to her house, so that she might yet execute her purpose. But of this, of course, there is no proof. About three o'clock she was at the grocery again, and asked for beer. Mrs. Lanagan says she told her she did not need any, and declined to let her have it. The answer and the conduct of Mrs. Lanagan at this time, indicate pretty strongly, I think, the condition in which she was at the time—or, at least, what Mrs. Lanagan thought of her condition. While there, Lanagan came home sick, and Miss Lubea had already taken to her bed.

Upon this state of facts, the question presents itself, whether at the time she committed the fatal deed the accused was intoxicated? That she was greatly excited there is no reason to doubt. This is sufficiently evident from the fact of her having visited the grocery so frequently. That she drank freely is, I think, also evident. Was she then intoxicated?

It is my duty to say to you, gentlemen, that, if she was intoxicated, even to such an extent that she was unconscious of what she was doing, still the law holds her responsible for her act. It is true, to constitute the crime of murder, there must be killing of a human being with a premeditated design to effect death. But this design need not be proved. Where the act is committed, the law imputes the design. It proceeds upon the simple principle that a man may reasonably be presumed to intend to do what he in fact does. Thus if a man will draw from his pocket a pistol and deliberately shoot down his fellow man, the law, without further proof, adjudges that it was in his heart to kill him. If he would excuse himself, he must show affirmatively that he had no



such guilty purpose. Then, and then only, can he be exonerated from guilt. If it appear that, by the inscrutable visitation of Providence, the faculties of his mind had become so disordered that he was no longer capable of discriminating between right and wrong in respect to the act he has committed, then the law, in its justice, pronounces him innocent of crime. But, if his derangement be voluntary—if his madness be self-invited—the law will not hear him when he makes his intoxication his plea to excuse him from punishment.

If, then, the accused mingled poison in the beer that was drank by Lanagan, the law charges her with a design to kill him—and though she may have been excited by drink, at the time, even to such an extent as not to know what she was doing, she must answer for the consequences. Her self-inflicted insanity must not be allowed to avail her for her defense. The law still imputes to her a murderous intent.

But it is urged, in behalf of the defense, that the accused was not merely intoxicated—that she was, in fact, insane. If this be so—if by the visitation of God she was so bereft of reason as to be unconscious of the character of the act she was committing, there is an end of her accountability. But before you can allow this ground of defense to prevail, you must be satisfied of its existence by affirmative proof. Every person is presumed to be sane. When the contrary is asserted, it must be proved. The presumption of sanity must be overcome by satisfactory countervailing evidence.

Upon this branch of the case, it is your duty to examine the facts with the most diligent care. And here the question of motive may well be considered. It has been urged by the counsel for defense that there could have been no possible motive for destroying the lives of Lanagan and Miss Lube, and that the absence of motive furnishes a strong ground for inferring that the act must have been committed in a state of insanity. The existence or want of motive to commit the crime alleged is always a legitimate subject of inquiry. In cases depending upon circumstantial evidence, it

is sometimes of vital importance. But it is never indispensable to a conviction that a motive for the commission of the crime should appear. The law imputes malice to the act, so that the very proof of the killing furnishes also presumptive evidence of malice. And yet, while the prosecution is relieved, by this legal presumption, from proving an actual motive for the commission of the offense, the absence of such proof is often an important consideration for the jury in determining the effect to be given to the other evidence in the case.

But it is contended, on behalf of the prosecution, that there is proof of a state of feeling, which, considered in connection with the state of mind exhibited by the accused at about the period in question, relieves the case of this objection. It appears that some time during the spring there had been a dance at Lanagan's. Though not one of the party, the accused went there and became engaged in an altercation with one Smith; angry words and loud conversation ensued. If it be true, as has been assumed throughout the trial, that the accused is of gentle birth and has once moved in the higher and more refined walks of life, what a painful illustration she presents of the rapid descent which a woman makes to the lowest depths of degradation and vice, when she once consents to take leave of virtue and innocence. Here we have this fallen woman, who is described to us as possessing high accomplishments and lady-like manners, voluntarily mingling with the parties to a grocery dance and engaging in a brawl with one of the party, and carrying the quarrel so far as to present her revolver and threaten to shoot him. To quell the disturbance she was required to leave the house, and finally Mrs. Lanagan led her home. This occurrence seems to have stung her pride, for one or two mornings after, we find her returning to the grocery, before Lanagan was out of bed; and she then, as Mrs. Lanagan says, commenced abusing her—saying that she was a very mean woman to keep a set of rowdies about her house to insult her when she came there. Her language was so loud and violent that Lanagan got up, and, coming into the grocery,

ordered her to leave, which she refused to do, until Mrs. Lanagan again interfered and induced her to go home.

The result of this quarrel was, that she did not again return to Lanagan's for some three weeks, after which she again renewed her visits. It is the theory of the prosecution that these occurrences left a sting rankling in the bosom of this woman, which needed but the excitement of which she was the subject, on the 25th of May, to arouse to such a degree as to make her resolve upon the destruction of those who had become the subject of her resentment. Certainly, these circumstances would furnish to a sound mind but a slight motive for the commission of such a crime. How far they would operate upon an irritable temperment, like hers, when greatly excited by stimulants, and, perhaps, other vitiating causes, it is for you, gentlemen, to judge.

There is another feature of this case, which may have some bearing upon the question under consideration, to which I would direct your attention. It is the manner in which the deed was accomplished. We see no outburst of passion, but everything is apparently cool and orderly. First, the proposition to drink the beer, and that insisted upon; then, obtaining the sugar, and arrangements to mix the poison with it while the glasses were being filled; then the refusal of the accused herself to drink, and her efforts to prevent any of the contents of the glass from being removed. These are characteristics of the transaction which may, perhaps, shed more light upon the state of this woman's mind at the time.

There is another class of evidence bearing upon the question of insanity, to which you will not fail to give the consideration which you may think it deserves. I refer to the conduct and conversation of the accused a short period previous to the 25th of May. This evidence is found chiefly in the testimony of the young sewing girl, Mary Jane Dillon, who became acquainted with her in March previous. The testimony of Anthony Goodspeed belongs to the same class. I will not recapitulate this evidence. It cannot but be fresh in your memories. There certainly must have been, in her statements to Miss D., a strange commingling of truth

and falsehood; the latter, perhaps, greatly predominating. Whether the tales she told were the vagaries of a distempered imagination, or the inventions of her fancy, designed to amuse her youthful and newly acquired friend, it is for you to inquire. There was, too, something exceedingly strange, at times, in her conduct—especially when in the morning she came, in her night clothes, to the residence of Miss Dillon, and borrowed her dress. It will be your duty to satisfy yourselves as to the state of mind to which this conduct is to be attributed.

It certainly was not strange that the accused and this young girl should be mutually pleased with each other. The accused, with an ardent temperament, which demanded society, was so situated that she was compelled to live alone. She had sought companionship among those who had no tastes and sympathies with her own, and whom she regarded, probably, with contempt. It was a relief to her solitariness, therefore, to meet with Miss Dillon—a young, artless imaginative girl, with whom she could at least talk. There was much, too, in the air and manner and romantic stories of the accused, to please the taste for romance which this young girl seems to have possessed. She says she was pleased with her conversation, though she admits that her ear was sometimes offended by expressions both of profanity and obscenity. How far the testimony of this girl tends to establish the defense, is for you to consider. It is upon this testimony supported, as it is, by some other kindred but less important evidence, that the counsel for the defense chiefly rely.

The theory of the defense is, that the accused had become apprehensive that she was about to be abandoned by one who had been her friend and supporter, and that this apprehension operating upon her nervous, excitable temperament, with the recollection of her own former position from which she had so sadly fallen, had unhinged her mind, and that the eccentricities which marked her conduct about the period to which our inquiries relate, were but the outbursts of incipient madness. To sustain this theory, the testimony of Mr. Brownell was introduced, to whom, it seems, early in

May, the accused had described her griefs and apprehensions.

Thus far, I have only noticed the testimony which relates to occurrences which happened before the arrest of the accused. What her conduct was afterward, is only important as it sheds light upon her previous condition. Her conduct after she was committed to prison, was, indeed, strange. How far her conduct was produced by the enormity of the charge preferred against her, and a sense of the condition in which she found herself and how far, by being suddenly deprived of the stimulants in which she had evidently been indulging so freely, and how far by a disordered intellect, are questions which I suggest to your consideration. In this connection, too, it will be proper to consider the opinions of the two physicians who had the opportunity of seeing her in jail, and who say that, in their opinion, she was not rational. Such opinions are allowed to be given in evidence, not as by any means controlling your own opinion, but to be considered by the jury, who are to give them such weight as, in their judgment, having regard to the experience and opportunities for observation which those who express the opinions have enjoyed, such opinions deserve.

And now, gentlemen, I have noticed what I have regarded as the principal points and features of the case before us. I have not thought it fit to review at length the evidence, persuaded as I am that it is all fully within your recollection. Here my duty ends, and yours begins. I am conscious how imperfectly I have discharged that duty, and yet it has been my single aim to administer the law with a steady and unswerving hand. In the discharge of your duty, be faithful to your own obligations. Deal justly with this poor, unhappy woman, whose destiny is now committed to your hands. Deal mercifully with her, too. This is your privilege. The law allows every well grounded doubt to avail for her acquittal. If, after a full consideration of all the facts in the case, no such doubt rests upon your minds, you need not hesitate, though it be with anguish of heart, to pronounce her guilty. But if you can, after all, say you are

not satisfied of her guilt, it will be your more agreeable duty to pronounce a verdict of acquittal.

*Mr. Townsend.* The prisoner's counsel ask the court to charge the jury: First—That if the jury find that at the time of the alleged commission of the act with which the prisoner stands charged, the prisoner was not in a situation to distinguish between right and wrong, as respects the act alleged to have been committed, independent of the influence of the present intoxication, the prisoner is entitled to an acquittal, notwithstanding that she was at the time of the commission of the act under the influence of intoxication.

Second—That it would not have been competent for defendant's counsel to have asked Doctors Bontecou and Hegeman, whether, in their opinion, the prisoner was or was not, at the times spoken of by them, in a condition to distinguish between right and wrong, as to the act with which she is charged.

JUDGE HARRIS assented to both propositions and so charged; and the *Jury*, at six and a quarter o'clock, retired to deliberate on their verdict.

#### THE VERDICT.

About half past eight an officer reported that the jury had agreed upon a verdict. The information was immediately sent to the presiding justice and the sheriff.

At five minutes past nine *Sheriff Price* brought in the prisoner by the private passage, the crowd being so great as to prevent their entrance from the front. She was accompanied by the sheriff's wife and daughter, both of whom, as well as the sheriff, evinced much feeling. She wore the impenetrable blue veil, as usual.

The jury entered and took their seats.

The *Prisoner* sat veiled within the bar. The names of the jurors were called.

*The Clerk.* Gentlemen of the Jury have you agreed upon your verdict?

*The Foreman.* We have.

*The Clerk.* How do you find the prisoner at the bar—guilty or not guilty?

*The Foreman.* Guilty.

*The Clerk.* You say you find the prisoner guilty of the crime of murder whereof she stands indicted, and so say you all?

*The Foreman.* We do.

*Mr. Pierson* asked that the jury be interrogated separately.

*The Clerk* asked each juror whether the verdict rendered was his verdict, and all answered in the affirmative.

*Mr. Bingham* inquired if the court intended to pass sentence at once?

*Mr. Pierson* arose and was proceeding to address the court.

The *Prisoner*. Shame on you judge! shame on you! There is corruption here! There is corruption in the court!

*Mr. Pierson*, aided by the sheriff and his wife and daughter, attempted to quiet her, and then proceeded to remark that the defense desired a postponement of the sentence, at least until the following Monday, in order to enable them to prepare and present some points touching the legality of the indictment.

*Mrs. Robinson*. The court is corrupt! The district attorney is corrupt! Some of the jury are corrupt! I demand another judge!

*Mr. Pierson*. Madam, if you do not remain quiet, I will leave you!

*Mrs. Robinson*. I will speak! Why should I not?

*Mr. Townsend* most firmly believed that the verdict of conviction had been rendered against the veriest lunatic that ever lived. He appealed to the court to grant the suspension asked for by his associate counsel—that they did not then know precisely how they should proceed and desired time to consult.

JUDGE HARRIS replied that he was expected to open a circuit in another county on Monday, and that the delay would be inconvenient. The case would not, probably, be at all prejudiced by pronouncing sentence at once, and he would therefore suggest to the defense, that they could present their points as well after the entering of judgment as before. However, he was ready to subject himself to any personal inconvenience, if a suspension of sentence should be considered necessary.

*Mr. Hogeboom* said that the prosecution would not insist on the sentence being pronounced immediately, against the expressed desire of the defense for an opportunity of consultation; yet he could not perceive the necessity of a postponement, especially after the suggestion of the court; besides, they were ready to waive all objections to the defense proceeding in the matter after sentence passed.

JUDGE HARRIS. I feel it to be my duty to conform to the wishes of the prisoner's counsel, and order an adjournment of the court until half past eight o'clock Monday morning.

May 29.

The *Prisoner* entered with the sheriff and his deputies, and the ladies who had previously accompanied her, between the latter of whom she took her seat within the bar. Every eye was turned upon the mysterious figure enveloped in the blue veil. She walked to her seat with a faltering and uncertain step, and was evidently much excited and nervous. This, however, she soon mastered, and presently entered into active conversation with the sheriff, her counsel and the ladies who accompanied her.

JUDGE HARRIS. I hope that every person in this crowded assembly will feel it incumbent upon him or herself to preserve perfect quiet and order. Let none move—let none speak, even in a whisper, so that everything may be done with decorum—so that all may see—so that all may hear—so that nothing may occur to disturb the

court, interfere with the proceedings, or violate the strictest rules of propriety.

*Mr. Beach* moved a suspension of the sentence, in order to afford time for the defense to prepare a bill of exceptions or to take such action as was necessary, with reference to a question of irregularity in the organization of the grand jury that found the indictment against the prisoner. The district attorney had issued no precept to the sheriff for the meeting of the court and jurors at the February term, when the indictment was found, as required by statute.

*Mr. Beach* read from the Revised Statutes in support of his position, and contended that the requirement remained in force, notwithstanding subsequent legislation. He referred to a case in *Johnson's Reports*, analogous to this, which was tried in 1814, and in which a new trial was granted. He also referred to the statutes to show that the requirement in question is expressly applied to courts of oyer and terminer, and argued at considerable length that this informality invalidated the proceedings by which the prisoner had been convicted. The defense had been informed, since the rendition of the verdict, that one of the jurors had expressed an opinion previous to the trial, that *Mrs. Robinson* was guilty, and ought to be convicted. Now, that jury, when it was empaneled, stated, each for himself, that he had formed no opinion as to the guilt or innocence of the prisoner that would render him incompetent to try the cause. For want of time, no affidavit upon this point had been obtained, but this information was sufficiently reliable to justify him in urging it as another reason for suspending sentence. They, at least, required time to look into the matter, as otherwise the defense might be cut off from remedy.

*The District Attorney* contended that the provisions of the statute referred to were not applicable to this case, and read from subsequent enactments to show that they referred only to special terms, ordered by the governor or circuit judge.

*Mr. Hogeboom* added that the counsel on the part of the prosecution had but a limited time for the consideration of the motion, and consequently were not prepared to argue the question at length. The prosecution might, however, offer an affidavit showing that the defense were aware, before the trial, of the objection now urged; the objection should have been made preliminary to the trial, not afterward; for it applies as well to the indictment, as the trial itself. It might, therefore, be properly urged that the objection had been waived, for the reason that it had not been presented at the proper time—prior instead of subsequent to the conviction. Besides there is no real necessity for a suspension of sentence in order to obtain a decision on the point in a higher tribunal. A similar motion was made in the case of *Hendrickson*, when Judge *Marvin* decided that the passing of sentence would not interfere with a review of the case by a full bench, and he pronounced sentence immediately on conviction. The execution of *Hendrickson's* sentence was postponed from month to month, until every means



of averting it was exhausted. This case may be reviewed long before the day fixed for execution. He would not argue the question upon its merits now, because an opportunity would be given for doing that afterward; but he would assume that the requirement referred to was directory rather than mandatory, and that the direction does not apply to ordinary courts of oyer and terminer, held at stated times, but to jail deliveries ordered by the governor. The court did not owe its jurisdiction to the precept; that came from the statute. It is contended that the jury was not properly drawn and summoned. The question is, is this court legally constituted? And the question is brought up after the court has been in session many weeks, disposed of a large number of cases and sentenced many persons to state prisons. As to the other objection, the expression of a juror that the prisoner ought to be convicted, he thought the present not the proper time to urge it. The defense had made its own jury; it was the prisoner's jury; they had the right of peremptory challenge, but were relieved of the necessity of exercising it by the action of the court.

JUDGE HARRIS inquired whether it was the intention of the defense to submit the questions raised, in the Court of Oyer and Terminer or in the Supreme Court?

*Mr. Beach.* The prisoner's counsel are not entirely agreed as to the steps proper to be taken. They, therefore, desire time to consult and agree on a plan of action, in order that their cause may not be prejudiced by any misapprehension.

JUDGE HARRIS. The court is inclined to yield to the request of the defense, without intimating an opinion as to the points raised, though it has an opinion. It is the spirit of the law, that while it marches on with steady step to the fulfillment of its mission, it affords, at the same time, every opportunity of defense, substantial and technical, to those against whom it proceeds. It says to its ministers, forbear, until every such opportunity has been thus extended. I shall, therefore, suspend sentence and direct that the prisoner remain in the custody of the sheriff until the further order of the court.

#### THE JUDGMENT AFFIRMED ON APPEAL.

At the May term, 1855, in the Supreme Court at Albany, the appeal was heard and decided, and the judgment of the lower court was affirmed. (See 2 Parker's Criminal Reports, 235.)

#### THE SENTENCE.

*June 19.*

The fact that the prisoner was to be sentenced today, being noised abroad, a large crowd collected in and about the court house, before the commencement of the afternoon session. At 3 o'clock Mrs. Robinson entered the room, tastily attired, and shrouded in her veil. She passed within the bar with a firm step, laughing and

conversing with the sheriff, and, on taking her seat by the side of her counsel, saluted him politely with the utmost coolness and composure.

*Mr. Bingham.* May it please your Honor: I have a motion to make, in the matter of Henrietta Robinson, who stands convicted of the murder of Timothy Lanagan. The prisoner is present, and if it is the pleasure of the Court, I move that the sentence of the law be now passed upon her.

*Mr. Pierson.* I have now nothing further to say against the passing of sentence. All that I was able to do, has been done to avert it. I have striven with all my power to save the life of this poor woman, but my exertions have been in vain. I have labored, also, without fee or reward of any kind, except the reward which the recollection of having diligently and faithfully sought to save a fellow-being, from what I consider an undeserved penalty, will afford. I believe this woman should have had a new trial. I believe she was unjustly condemned—but legal tribunals have adjudged otherwise, and ordered that she shall suffer death. The moment having now arrived when further effort would be not only vain but injudicious, I resign my unhappy client to her fate, and submit to the mandate that demands her sacrifice.

JUDGE HARRIS. Mrs. Robinson, have you any objections to removing your veil? The *prisoner* threw her veil over her bonnet, at the same time laughing and conversing with those around her.

#### THE SENTENCE.

The COURT. It is my painful duty, Mrs. Robinson, to inform you that the Supreme Court at Albany, has denied the application of your counsel for a new trial in your case, and has ordered this Court to pass the sentence of the law upon you. Have you anything to say before that sentence is passed?

*Mrs. Robinson.* Yes; I have much to say, but I know I should be interrupted.

The COURT. You have been convicted of the willful murder of Timothy Lanagan.

*Mrs. Robinson.* Yes; but it was upon false evidence. You have all conspired against me. Shame, judge, shame!

The COURT. The law has proceeded with a slow but steady step to judgment. You have passed from one situation to another, until you find yourself in this condition. To you life is lost—character is gone—friends are gone.

*Mrs. Robinson.* No, no—not all.

The COURT. If I thought you would listen to me—but I know you would not—I would advise you to abandon this fruitless struggle with the world; I would counsel you to throw off this feigned insanity, and prepare to meet the fate that awaits you with true womanly resignation. Everything is lost to you. Honor and virtue are gone. Indeed, life to you is not worth possessing.

*Mrs. Robinson.* Oh, don't trouble yourself about that, if you please, judge.

The COURT. I am aware that you would listen to nothing from me. I shall, therefore, without further remarks, proceed to pass sentence upon you. The sentence of the Court is, that you, Henrietta Robinson, be detained in the county prison of the county of Rensselaer until the third day of August next, and that on that day, between the hours of ten o'clock in the forenoon and two o'clock in the afternoon you be hanged by the neck until you be dead, and may God, in his infinite mercy, save your soul.

*Mrs. Robinson.* You had better pray for your own soul, sir.

*Mr. Pierson* desired her to remain quiet.

*Mrs. Robinson.* Why should I remain quiet? What for? Am I not the victim of a political conspiracy intended to crush an innocent man? I will not be silent. All have deserted me. Martin I Townsend has deserted me. Sheriff Price is a shameless, villainous, heartless——

*Mr. Pierson.* Be quiet.

The prisoner continued her denunciations against various individuals, declaring that she was the victim of a political conspiracy.

The COURT. It is particularly desirable that the audience

should remain seated, and it is further to be hoped, that no one will follow the prisoner to the carriage. The sheriff will remove her.

The *Prisoner*. Judge Harris, may the judge of judges be your judge.

#### THE COMMUTATION OF SENTENCE.

Mrs. Robinson had been brought up in the Church of England, but after her sentence became a Roman Catholic, made confession of her sins and received the sacrament of baptism at the hands of the priest of St. Mary's Church. She professed to look forward to the day of her execution with gratification, as the end of her earthly tribulations, and the commencement of a happier existence. The thought of living longer—of the commutation of her sentence to imprisonment—appeared to be repugnant to her, in the extreme. She resisted all effort in that direction, beseeching visitors to prevail on the governor to let her die as the law had ordained, denouncing those who interested themselves in this behalf, as enemies, who had united in that "political conspiracy" which had compassed her condemnation by false evidence in a "corrupt" tribunal, and which now only sought to snatch from her the rest she was about to find in the grave.

As the day for the execution of the condemned woman approached, from the people of Troy, from different parts of the state and from other states communications were sent to the governor, urging him in the most pressing manner to avert the judgment of the law. He was appealed to as a christian, as a parent, as a philanthropist, as an executive living "in this intelligent nineteenth century," to prevent the barbarism of putting an insane woman to death. The sheriff in whose charge she was, some of the counsel who appeared against her on the trial, and Judge Harris himself went before the governor and represented that, notwithstanding their belief in her sanity at the time of the conviction, and the opinion that an acquittal, under the circumstances, would have been deplorable as an example, nevertheless, her subsequent conduct had been so eccentric and unaccountable, that it was impossible to suppress serious doubts as to the soundness of her mind. They consequently recommended the case to the attention of the governor as one, in their judgment, calling, in a peculiar manner, for the exercise of the gubernatorial prerogative.

On July 27th, 1855, a week before the day appointed for the execution, the governor commuted the sentence to imprisonment for life in Sing Sing prison. The next day she was taken to Sing Sing where she remained until transferred to Auburn State Hospital in 1873 and later to the Matteawan State Asylum where she died on May 14th, 1905.

## THE TRIALS OF THE WESTERN INSURGENTS FOR TREASON, PHILADELPHIA, PENNSYLVANIA, 1795.

### THE NARRATIVE.

The Act of Congress of March, 1791, which imposed a tax upon spirits distilled within the United States, produced at once great opposition, both in and out of Congress. A majority of the southern and western members, even before the bill was passed, proclaimed an organized agitation for its repeal; and hardly had the President's signature been obtained before the measure was assailed violently from the country at large. It was branded with the name of an excise, a term very hateful to the people, as connected with the former oppressions of the British Government. It was declared unnecessary and tyrannical. The Legislatures of Maryland, Pennsylvania, Virginia and North Carolina united in solemn declarations of rooted dislike, and of resistance, in some cases hardly to be reconciled with constitutional opposition; and by the latter State a position was assumed, which, in later days, would have been called nullification. But it was in the western parts of Pennsylvania and Virginia, and particularly in the counties of Alleghany, Washington, Fayette and Westmoreland, in the first-mentioned State, that resistance to the bill was most violent, and it was there an agitation was started which, in the course of a few years, ripened into an organized insurrection, and involved its leaders in the crime of treason.

The peculiar opposition of these portions of the Union may be accounted for by the circumstance that the war of the Revolution, by cutting off the trade in foreign spirits, had turned the attention of the grain growing districts of these States to the distillation of rum and whisky. This soon grew into a very considerable business; the greater part of the United States was supplied from these sources, and spirits were even exported into Canada. So lucrative did

this trade become, that almost the whole local population, at the end of the Revolution, was connected with it. The "Western Country," as it was then called, swarmed with distilleries,

Not only were whisky and rum articles of commerce and of consumption, but from the natural deficiency of specie in a new country they also were used universally as currency. Payments were made in them; and they were received in satisfaction of debts.

The agricultural interests became enlisted in the traffic by the immense amount of grain thus consumed. At one time, such was the quantity disposed of in this manner, that a famine was dreaded, and, moved by popular clamor, the Legislature was compelled to interfere and pass a law to prevent the distillation of any kind of grain; which was, however, afterwards repealed, so far as regards rye and barley.

The first indication of a spirit of discontent was manifested in the general circulation of opinions unfavorable to the law, and calculated to discourage the acceptance of offices under it, or any compliance on the part of those who might be so disposed. This was soon followed by a pretense of a cessation of distilling. Then succeeded secret associations to abstain from compliance with the law, which were very general. These were found ineffectual. The law went into operation in June, 1791, and the offices were pretty generally accepted.

The officers then became marks for insult and opprobrium. Threats against them were frequent. Soon actual violence was resorted to, to prevent the execution of the law. Before these, however, another engine was employed—the expression of discontent by means of public meetings.

In September, 1791, the opposition broke out into open violence. Robert Johnson, a collector in Alleghany and Washington Counties, was seized by an armed mob and tarred and feathered. Yet the authorities hesitated to proceed to extremities. No means had as yet been provided by Congress by which the Executive could come to the assistance of the judiciary, in the enforcement of the laws. The Constitution had been in operation but a short time; the actual strength

of the government was not known; it was, therefore advisable not to put forth its energies unless with certainty of success. But this had only the effect of encouraging the discontented. The outrages soon became only more bold and violent. Mr. Wells, the collector for Westmoreland and Fayette counties, was ill-treated, and many private citizens, who had declared their determination to support the laws, were exposed to insult, and even personal violence. In October, 1791, an unfortunate man of the name of Wilson, who was insane, fancying himself a collector of the revenue, or invested with some office in connection therewith, told a number of people that he was engaged in an important inquiry in regard to the excise, and that he was to ascertain and report to Congress those who had not entered their stills. A few days after this he was pursued by a party of men in disguise, taken out of his bed, and carried about five miles into the county, stripped of his clothes, and, after having been inhumanly burnt in several places with hot irons, was tarred and feathered.

Not long after this, one Rossberry was tarred and feathered for advocating the excise law. An armed band seized and carried off two persons who were witnesses in the case of Wilson. Many attempts against the person of Inspector General Neville, were made, in order to force him into a resignation.

It soon became impossible to obtain places for revenue offices. In August, 1792, General Neville obtained the house of one William Faulkner, a captain in the army, for an office of inspection in Washington county. Soon after this, Captain Faulkner was met by a large number of people, in the same neighborhood where Johnson had been maltreated the preceding year. A knife was put at his throat, and the assailants threatened to scalp, tar and feather him and to burn his house, unless he would promise to prevent its further use as an office. He was compelled to make the promise; and, in consequence, wrote a letter to the Inspector, countermanding the permission to use his house.

In April, 1793, a party of armed men in disguise, made

an attack on the house of Wells, the Collector of Revenue, who resided in Fayette county. He was not, however, at home that night; and they, therefore, were obliged to content themselves with breaking open his house, threatening, terrifying and abusing his family. In the following June, the Inspector, General Neville, was burnt in effigy in Alleghany county, at a place and on a day of public election, and in the presence of the magistrates and other public officers, without any interruption whatever.

On the 22nd of November, in the same year, another party of men, disguised and armed, went to the house of Wells. They broke into it, and demanded a surrender of his commission and official books. On his refusal, a pistol was put at his head, and he was compelled to comply under threats of death. Not content with this, the rioters, before they departed, ordered him, under pain of another visit and the destruction of his house, to publish his resignation within two weeks.

In January, 1794, William Richmond, who had given information against some of the rioters in the affair of Wilson, had his barn burnt, with all the grain and hay that it contained; and the same thing happened to Robert Shawhan, a distiller, who had been among the first to accede to the law, and who had always spoken favorably of it. James Kiddoe and William Coughran, who had entered their stills, were first threatened and then attacked. The grist-mill of the former was mutilated, and the still of the latter destroyed, and his saw and grist-mills rendered useless. The office in Westmoreland was repeatedly attacked in the night by armed men who fired upon it; but it was defended with so much courage by Wells, the collector and Reigan, the owner of the house, as to maintain it for the remainder of the month. At midnight on June 6th, a number of persons armed and painted black broke into the office of John Lynn, a collector; took him to the woods and made him swear that he would never again allow his house to be used as an office; never again have an agency in the excise and never disclose their names.



General Neville had received many warnings that his house would be attacked. On July 17, a number of rioters assembled at Couche's Fort, a few miles from his residence, to the number of five or six hundred men. A plan was concerted to proceed at once to General Neville's, to compel the resignation of his office, and the delivery of his papers, and to seize the marshal. They accordingly marched there in a body, and, after notifying the women and children to withdraw, began the attack. The outhouses and adjacent buildings were first set on fire, which compelled the General and those with him to come out and surrender.

The mansion was then set on fire, and it and the out-buildings consumed. While the house was burning, the rioters broke open the cellar, drank up the wine, and many things of value were stolen therefrom. Later, another attack was made upon the residence of Wells, the Collector of Fayette County. His house was burned, and he was compelled to resign his commission, and swear never to hold the office for the future. Threatening letters were sent to Webster, the Collector of Westmoreland County; and a party going to his house, he made no resistance, but brought out his commission and papers himself, tore them up and trod them under foot.

President Washington now determined that the insurrection should be suppressed. If the state government would not do it, then the federal government must. He issued a proclamation commanding the malcontents to disperse and called for 12,950 militia from the states of New Jersey, Maryland, Virginia and Pennsylvania. The governors of the states responded, and while the militia was assembling a last attempt was made to render its employment unnecessary. Three distinguished citizens of Pennsylvania were by the President appointed commissioners, to bear to the insurgents a general amnesty for past offenses on the sole condition of a future obedience, to which the governor of Pennsylvania added two more.

They met at Pittsburg on August 21st, but after negotiations with the insurgents, were obliged to report that there was no probability that the act for raising revenue on dis-

tilled spirits could be enforced by the usual course of civil authority, and that some more competent force was necessary to cause the laws to be duly executed, and to insure to the officers and well-disposed citizens that protection which it is the duty of government to afford.

This last appeal having failed, the militia was at once put in motion. The command of the expedition had been conferred on Governor Lee of Virginia; and the Governors of New Jersey and Pennsylvania commanded the militia of the several states, under him.

The army marched in two divisions into the country of the insurgents. The greatness of the force prevented the effusion of blood. The disaffected did not venture to assemble in arms. Though many complaints were made against the excesses of the soldiery, no further violations of the laws occurred. The excise was continued without opposition and revenue collected under it until the year 1805, when the law was repealed.

After quiet had been thus restored and the civil authority was enabled to assert itself, the prosecutions of those concerned in the insurrection were carried on with vigor, and a number of arrests of those who took the most active part were made. Indictments for treason were found against them and they were tried in the United States Court at Philadelphia. Many pleaded guilty, some were dismissed for want of evidence, some were granted further time, and those who were convicted were afterwards pardoned by the President.

### THE TRIAL.<sup>1</sup>

*In the United States Circuit Court, Philadelphia, Pennsylvania, May, 1795.*

HON. WILLIAM PATERSON, <sup>2</sup>	} Judges.
HON. RICHARD PETERS, <sup>3</sup>	

<sup>1</sup> *Bibliography.* \* Wharton's State Trials, see 4 Am. St. Tr. 616. Dallas' Reports of the Supreme Court of the United States and

May 18.

Indictments for treason had been previously returned against a number of the Insurgents in the resistance to the Excise Law in the western counties of Pennsylvania.<sup>4</sup> A *venire* was issued in each case summoning a jury for the April term and to each writ the marshal returned a separate panel containing the names of thirty-six jurors from the city of Philadelphia, fifteen from the county of Delaware, nine from the county of Chester, and twelve from each county in which the treason was charged to have been committed, making seventy-two jurors on each panel, and one hundred and eight jurors summoned on the whole.

The act of Congress (1 Vol., p. 112, Sec. 29) directed "that any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury and witnesses to be produced on the trial for proving the said indictment, mentioning the names and places of abodes of such witnesses and jurors, delivered unto him at least three days before he shall be tried for the same."

The *District Attorney* had, in due time, delivered to the several prisoners copies of the indictment, of the panel of jurors, and of the list of witnesses; but had omitted to deliver a copy of the caption of the indictment, and to specify the occupations, or the places of abode of the jurors and witnesses, otherwise than by mentioning the counties in which the jurors respectively resided.

*William Rawle*,<sup>5</sup> *District Attorney*, and *William Bradford*,<sup>6</sup> *Attorney General*, for the United States. *Mr. Lewis*,<sup>7</sup> for the Prisoners.

Pennsylvania, Vol 2; Federal Cases, St. Paul, West Pub. Co., 1896, Book 26.

<sup>2</sup> See 4 Am. St. Tr. 638.

<sup>3</sup> See 4 Am. St. Tr. 616.

<sup>4</sup> The names of the prisoners are not given in any of the reports of the proceedings.

<sup>5</sup> See 4 Am. St. Tr. 624.

<sup>6</sup> BRADFORD, WILLIAM. (1755-1795.) Born Philadelphia, Pa. Great-grandson of the first printer in Philadelphia. Graduated Princeton (A. B., 1772; A. M., 1775); studied law with Edward Shippen; admitted to Bar (Philadelphia), 1778. In Revolutionary War served as major of brigade to General Roberdeau; captain of Pa. Battalion Flying Camp, 1776; captain of 11th Pa., 1776-1777; lieutenant colonel and deputy comm. general of musters, 1777-1779; attorney-general of Pennsylvania, 1780; judge Supreme Court (Pa.), 1791-1794; attorney-general of the United States, 1794. In early life wrote pastoral poems in imitation of Shenstone which were published in "Philadelphia Magazine." Author of (1793) "An Inquiry How Far the Punishment of Death is Necessary in Pennsylvania" (an essay in the form of a report for the

*Mr. Lewis* suggested the following exceptions, not so much for the existing cases, as to prevent the introduction of precedents, injurious to the rights and safety of posterity: (1) That the marshal had returned a greater number of jurors than the law authorized, and that he had returned a several panel in each case, instead of one general panel to try all the issues at this court. (2) That a copy of the caption of the indictments as well as a copy of the indictments themselves, had not been delivered to the respective prisoners. (3) The lists furnished to the respective prisoners, do not contain a sufficient specification of the addition and places of abode of the jurors and witnesses.

*Mr. Bradford* (attorney general of the United States) and *Mr. Rawle* (attorney of the district) were also impressed with the propriety and necessity of establishing sound and permanent principles on this first discussion of the doctrine of treason, as it applied to the existing Constitution of the United States. But they contended: (1) That the exception to the number of jurors returned, and to the mode of returning separate panels, ought not to be allowed. (2) That it is not necessary, nor is it material, to furnish the prisoner with a copy of the caption, as well as of the indictment. (3) That the addition of the jurors and witnesses, as to the place of abode, is sufficient; but if the Court think otherwise, time will be allowed to amend it. The act of Congress, however, does not require a specification of the occupation of the jurors and witnesses, but only of their names and places of abode; and it cannot be controlled by the provision of the State act, which is in that respect different; but must be deemed substantive and independent.

May 18.

PETERS, JUSTICE. I have considered the objections made to the panels, and do not conceive these objections relevant.

Although, in ordinary cases, it would be well to accommodate our practice with that of the state, yet the judiciary of the United States should not be fettered and controlled in its operations, by a strict adherence to state regulations and practice. But I see not, that in a liberal view and construction of the laws of the United States, on this subject, a rigid adherence to all the local and economical regulations of the

use of the Legislature, prepared at the request of Gov. Mifflin, which brought about a mitigation of the penal laws of Pa.). *M. A.* (Honorary) Univ. of Pa., 1781. See *Appleton's Cyc. Am. Biog.*, 1915; *National Cyc. Am. Biog.*, 1897; *Princeton Univ. Gen. Cat.* (1746-1906) 1908; *The Philadelphia Bar, 1776-1868* (D. P. Brown) 1868; *Martin's Bench and Bar of Philadelphia*, 1883; *Allibone's Dictionary*, 1858; *Univ. of Pa. Cat.* (1794-1893).

<sup>7</sup> See *ante*, p. 6.

state, is directed or necessary. It should seem, that the most pointed reference was had to the designation and qualification of jurors, and not to the exact numbers of which the panel should consist. The legislature of a state have in their consideration a variety of local arrangements, which cannot be adapted to the more expanded policy of the nation. It never could have been in the contemplation of Congress, by any reference to State regulations, to defeat the operation of the national laws. Now, there are cases, which have been stated, in which some of the criminal laws of the United States may be rendered impracticable by an adherence to the rule of numbers prescribed as to jurors, in criminal cases, by the state law; and, especially, if there must be but one panel as has been contended. Yet, the most substantial requisites, to-wit, the qualifications of jurors and mode of selection, may be adhered to. As to the clause in the law of the United States, directing that "the laws of the states (with great exceptions) shall be regarded as rules of decision, in trials at common law, in the courts of the United States," I do not think it applies to the case before us.

All the arguments founded on the inconveniences to the defendants, if in this case particularly any such exist (of which I much doubt), weigh lightly, when set against the delays and obstructions which the objection would throw in the way of the execution of the laws of the nation.

PATERSON, JUSTICE. The objections that have been suggested on this occasion, are principally founded on the 29th section of the judicial act of Congress, which refers the federal courts to the state laws, for certain regulations respecting juries. But the words of this reference are clearly restricted to the mode of designating the jury by lot, or otherwise; and to the qualifications which are requisite for jurors, according to the laws and practice of the respective states. Since, therefore, the act of Congress does not itself fix the number of jurors, nor expressly adopt any state rule for the purpose, it is a necessary consequence, that the subject must depend on the common law; and by the common law, the court may direct any number of jurors to be summoned, on

a consideration of all the circumstances under which the venire is issued. There are instances, indeed, where five juries have been summoned upon a trial for high treason, in order that after the allowance of the legal challenges, a competent number might still be insured. In the present instance, the precept requires the marshal to return at least forty-eight jurors; and he has not in my opinion been guilty of any excess in the exercise of that discretion for returning a greater number, with which he is legally invested.

Neither is the mode of making his return justly exceptionable. As the act of Congress directs that twelve jurors shall be summoned from the county in which the offense was committed, I cannot conceive any more proper, or more legal way of proceeding, than by issuing a venire in each case; and then there must of course be a separate panel returned, in conformity to every writ.

Thus, likewise, the act of Congress and the state act have been reconciled, and both put into operation; twelve jurors being returned in pursuance of the former, and sixty jurors being returned in pursuance of the latter law.

With respect to the objection, that a copy of the caption of the indictment has not been furnished to the prisoners, it may be observed, that, although the practice of Pennsylvania has been different, yet, the caption and the indictment seem naturally to form but one instrument; and copies of both should, therefore, be delivered under the provisions of the act of Congress, there can be little inconveniency in adopting this rule; and it is calculated to avoid much difficulty and controversy.

The objection, that the place of abode of the jurors and witnesses has not been sufficiently designated, in the lists furnished to the prisoners, is, likewise, in our opinion a valid one. The object of the law was to enable the party accused, to prepare for his defense, and to identify the jurors who were to try, and the witnesses who were to prove, the indictment against him. It is contrary to the spirit and intent of such a provision, that the whole range of the state, or of a county, should be allowed, as descriptive of a place of abode;

and it is the duty of the judges so to mould the practice and construction of statutes, as to render them reasonable and just. With regard to the place, therefore, we think the townships in which the jurors and witnesses respectively reside, should be specified; but the act of Congress does not require a specification of their occupations, and the niceties of the state act are not, in that respect, incorporated into the federal system.

In consequence of this decision, the trials were suspended, in order to give the attorney of the district the three days required by the act of Congress for delivering to the prisoners amended copies of the caption and indictment, and of the lists of jurors and witnesses.

Later two of the prisoners (Stewart and Wright) being brought to the bar, on separate charges of treason, *Mr. Lewis* read their depositions, stating the absence of material witnesses in both cases, and moved to postpone the trials till an opportunity was given to procure the attendance of those witnesses from the western counties. He urged the general inconveniency of a commitment and trial at so great a distance from the scene of the criminal transaction; the friendless situation of the prisoners, and the poverty of the witnesses. The Court ordered the trials of Stewart and Wright postponed; and it was agreed that they should not be brought on till the trial of the other prisoners who were ready for trial was concluded. One Porter was then arraigned on an indictment for treason, committed in the county of Alleghany, in the state of Pennsylvania, by levying war against the United States. After a long examination of witnesses, it was discovered, that the prisoner, though he was at *Couche's Fort*, had taken no part in the insurrection, that, in fact, he was not the person, liable to the charge, but another person of the same name; and thereupon the jury, by direction of the Court, found a verdict of not guilty.

## THE TRIAL OF JOHN MITCHELL FOR TREASON, PHILADELPHIA, PENNSYLVANIA, 1795.

### THE NARRATIVE.

Among those who pleaded not guilty to a charge of treason in resisting the Excise law, was John Mitchell. But on his trial it was shown that he was one of the party at Couche's Fort, and that he was armed; that he assisted at the burning of General Neville's house and that he was present at the meeting at Braddock's Field, and was active in other ways in resisting the law and in persuading others to do so. His lawyers tried to convince the jury that what he did was not a "levying of war" against the United States, but without success, for he was found guilty as charged in the indictment. But he was afterwards pardoned by the President.

### THE TRIAL.<sup>1</sup>

*In the United States Circuit Court, Philadelphia, Pennsylvania, May, 1795.*

HON. WILLIAM PATERSON,<sup>2</sup> *Judge.*

The prisoner, John Mitchell, had been indicted for treason in levying war against the United States. He pleaded *not guilty*.

*William Rawle*,<sup>3</sup> District Attorney, and *William Bradford*,<sup>4</sup> Attorney General for the United States for the Prosecution.

*Edward Tilghman*<sup>5</sup> and *Richard Thomas*,<sup>6</sup> for the Prisoner.

<sup>1</sup> *Bibliography.* See *ante*, p. 625.

<sup>2</sup> See 4 Am. St. Tr. 638.

<sup>3</sup> See 4 Am. St. Tr. 624.

<sup>4</sup> See *ante*, p. 626.

<sup>5</sup> TILGHMAN, EDWARD. (1750-1815.) Born Wye, Md. Educated in Philadelphia; entered University of Pennsylvania, 1764; studied Middle Temple, London, 1772-1774; admitted to Bar. 1774; began practice in 1774 and practiced many years in Philadelphia; offered



## THE EVIDENCE.

The circumstance of the prisoner being at Couche's was proved by a number of witnesses; his being at Braddock's Field by one witness, and his own confession; but there was only one positive witness to the fact of his having been at the burning of General Neville's house, though a second witness said "it ran in his head that he

had seen him there," and a third declared he had passed him on the march thither. The scope of the testimony as it respected the general object of the insurrection, and as it particularly applied to the prisoner, will be found sufficiently stated in the course of the arguments and charge.

*Mr. Rawle.* So frequently and fully has the offense of levying war against the government been defined, that a doubt can be hardly raised upon the subject. Kings, it is true, have endeavored to augment the number, and to perplex the descriptions of treasons, as an instrument to enlarge their powers, and to oppress their subjects; but in republics, and particularly in the American Republic, the crime of treason is naturally reduced to a single head, which divides itself into these constitutional propositions. 1st. Levying war against the government; and 2nd. Adhering to its enemies and giving them aid and comfort. In other words, exciting internal, or waging external war against the State. The second branch of the crime, thus designated, renders it unlawful and treasonable for any citizen to adhere to a foreign public enemy, whether assailing the frontiers, or penetrating into the heart of our country. But while such a co-operation endangers the success and prosperity of the community, the effects of domestic insurrection (which the first

Chief-Justiceship, but declined, 1806; trustee University Penn., 1794-1807. See Appleton's Cycl. Am. Biog., 1915; National Cycl. Am. Biog., 1897; Biog. Cat. Univ. Penn., 1894; Keith (Charles P.), Provincial Councillors of Pennsylvania; The Leaders of the Old Bar of Philadelphia (H. Binney), 1859; Martin's Bench and Bar of Philadelphia, 1883.

\* THOMAS, RICHARD. (1745-1832.) Soldier in the Revolutionary War; member from Pennsylvania of the Fourth, Fifth and Sixth Congresses. Died in Philadelphia.

branch of the division contemplates) strike at the root of its existence; and, in free countries above all, must be prevented, or corrected by the most vigilant and efficient sanctions of the law.

What constitutes a levying of war, however, must be the same in technical interpretation, whether committed under a republican or a regal form of government, since either institution may be assailed and subverted by the same means. Hence we are enabled in the first stage of our own experience, to acquire precise and satisfactory ideas upon the subject, from the matured experience of another government, which has employed the same language to describe the offense, and is guided by the same rules of judicial exposition. By the English authorities it is uniformly and clearly declared, that raising a body of men to obtain by intimidation or violence the repeal of a law, or to oppose and prevent by force or terror the execution of the law, is an act of levying war. Doug. 570. Again; an insurrection with an avowed design to suppress public offices, is an act of levying war, and, although a bare conspiracy to levy war may not amount to that species of treason; yet, if any of the conspirators actually levy war, it is treason in all the persons that conspired; and in Fost. 218, it is even laid down, that an assembly armed and arrayed in a warlike manner for a treasonable purpose is *bellum levatum*, though not *bellum percutsum*. Those, likewise, who join afterwards, though not concerned at first in the plot, are as guilty as the original conspirators; for in treason all are principals, and whenever a lawless meeting is convened, whether it shall be treated as riot or treason, will depend on the *quo animo*.

The evidence, unfortunately, leaves no room for excuse or extenuation, in the application of the law to the prisoners' cases. The general and avowed object of the conspiracy at Couche's Fort, was to suppress the offices of excise in the Fourth Survey. As an important measure for that purpose, it was agreed to go to Gen. Neville's house, and to compel him to surrender his office and official papers. Some of the persons who were at Couche's Fort, went accordingly, to

General Neville's and terminated a course of lawless and outrageous proceedings, by burning his house. The prisoner is proved by four witnesses to have been at Couche's Fort; and so far from opposing the expedition to General Neville's, he offered himself to reconnoitre. Being thus originally combined with the conspirators, in a treasonable purpose, to levy war, it was unnecessary that the purpose should be afterwards executed, in order to convict them all of treason, and much less is it necessary to his conviction, that he should have been present at the burning of General Neville's house, which was the consummation of their plot, or that the burning should be proved by two witnesses. But he is, likewise, discovered, by one of the witnesses at least, within a few rods of the General's, at the moment of the conflagration, and he is seen marching in the cavalcade, which escorted the dead body of their leader, in melancholy triumph, from the scene of action to Barclay's house. It is not necessary to consider the meeting at Braddock's Field, as an independent treason, though the avowed intention was to attack the garrison at Pittsburg, and to expel certain public officers from the town; but the conduct of the prisoner on that occasion, concurring in every violent proposition that was made; and his refractory and seditious deportment on the day prescribed for signing the declaration of submission to the laws, are corroborative demonstrations of that *mala mens*, that dark and dreary turbulence of soul, which is regardless of every social, moral and religious obligation.

PATERSON, JUSTICE. Before the defense is opened, I wish to direct the attention of the prisoner's counsel to two considerations. 1st. Whether the conspiracy to levy war at Couche's Fort was not, in legal contemplation, an actual levying of war? 2nd. Whether the proceedings at General Neville's house, were not a continuation of the act which originated at Couche's Fort? For, several witnesses have proved, that the prisoner was at Couche's Fort, and one positive witness has proved, that he was at General Neville's house.

*Mr. Tulkman* and *Mr. Thomas* premised that they did

not conceive it to be their duty to show, that the prisoner was guiltless of any description of crime against the United States, or the State of Pennsylvania. But they contended that he had not committed the crime of high treason, and ought, therefore, to be acquitted upon the present indictment. The adjudications in England upon the various descriptions of treason, have been worked, incautiously, into a system, by the destruction of which, at this day, the government itself would be seriously affected; but even there, the best judges, and the ablest commentators, while they acquiesce in the decisions that have already taken place, furnish a strong caution against the too easy admission of future cases, which may seem to have a parity of reason. Constructive, or interpretative treasons, must be the dread and scourge of any nation that allows them. 1 Hale P. C. 132, 259; 4 Bl. Com. 85. Take then, the distinction of treason by levying war, as laid down by the attorney of the district, and it is a constructive or interpretative weapon, which is calculated to annul all distinctions heretofore wisely established in the grades and punishments of crimes; and by whose magic power a mob may easily be converted into a conspiracy; and a riot aggravated into high treason. Such, however, is not the sense which Congress has expressed upon this very subject; for, if a bare opposition to the execution of a law can be considered as constituting a traitorous offense, as levying war against the government, it must be equally so, in relation to every other law, as well as in relation to the excise law; and in relation to the marshal of a court, as much as in relation to the supervisor of a district. And yet, in the penal code of the United States, the offense of wilfully obstructing, resisting or opposing, any officer, in serving, or attempting to serve any process, is considered and punished merely as a misdemeanor. 1 vol. Swift's edit., p. 100, Sec. 22. Let it be granted, that to compel Congress to repeal a law, by violence, or intimidation, is treason (and the English authorities rightly construed, claim no greater concession), it does not follow, that resisting the execution of a law, or attempting to coerce an officer into the resignation of

his commission, will amount to the same offense. Let it be granted, also, that an insurrection for an avowed purpose of suppressing all the excise offices in the United States, may be construed into an act of levying war against the government (and the English authorities speak expressly of the universality of the object, as an essential characteristic of this species of treason), it does not follow that an attempt to oblige one officer to resign, or to suppress all the offices in one district, will be a crime of the same denomination. 1 Hal. P. C. 135. Nor can another doctrine, urged in support of the prosecution, be fairly recognized. It is laid down in all the books, which have been cited, it is admitted by the Attorney General, that a bare conspiracy to levy war, does not amount to treason; but, it is contended, that if, at any time afterwards, a part of the conspirators should execute the plot, the whole of them will be involved in the guilt and punishment. Thus, no opportunity is left for repentance; the motives which restrain the absentees from attending at the scene of action, however pure, can furnish no excuse; and they are doomed to answer for the conduct of others, which they may, in fact, disapprove, and which they cannot, in any degree, control. The state of the evidence, however, renders it unavoidable, that this ground should be taken; for, unless the proceedings at Couche's Fort, and at General Neville's house, can be so combined and interwoven, as to form one action, there are not two witnesses to prove that the prisoner was at the latter place; and the conduct at the former, could only amount, under the most rigid construction, to a conspiracy to levy war, not to an actual levying of war against the government. With the necessity for two witnesses to an overt act of treason, it is not in the power of the judge or juries to dispense; it is a shield from oppression, with which the constitution furnishes the prisoner; and it cannot be supplied by vague conjectures, founded on the feeble recollection of a witness; nor by any idle declarations of the party himself, in a state of intoxication; a state that does not justify the perpetration of a crime, but may fairly be supposed to deprive the criminal of a knowledge of the extent of his

confession. 2 Hawk. 604; in note; Fost. C. L. 240; 4 Bl. C. 356; 1 Dal. Rep. 39, 40.

If this view of the law is correct, it will be easy to show, that its operation upon the facts, will entitle the prisoner to an acquittal. By the meeting at Braddock's Field, no act of treason was committed, nor was any plan for levying war contrived. The people assembled there upon a general invitation, founded on the calamitous state of the country; and, though they proposed banishing certain citizens (who were not public officers of the United States) from Pittsburg (which cannot surely be deemed treason), they neither executed their project nor committed any other outrage; but after some menaces and idle parade, dispersed to their respective homes. The prisoner was certainly at Braddock's Field; but no treason being committed there, his attendance is not a foundation for the present indictment. It may be admitted, likewise, that at Braddock's Field, he made some vaunting declarations of a traitorous intention; but a traitorous intention there, is no proof of his having levied war against the government at another time and in another place. With respect to the criminal proceedings at General Neville's house (which after all, amounts to the crime of arson, not of treason), it is agreed that only one positive witness proves the fact of his having been there; but, even that witness states, that the prisoner was alone, at the distance of thirty or forty rods; and it is not recollected whether he had a gun. Then it only remains to consider of the prisoner's presence at Couche's Fort; for his being seen in a cavalcade on the road to General Neville's, and his conduct on the day prescribed for signing the submission to government, when he was notoriously drunk, may prove him to be a very bad man, but will not be sufficient to maintain a charge of high treason. It does not, then, appear by the testimony of two witnesses, that the meeting at Couche's Fort was convened for the purpose of accomplishing a compulsory repeal of the excise laws, or a suppression of the excise offices. The meeting seems to have originated merely in a wish to consider what it was best to do in the actual state of the country. On this point a com-

mittee was chosen, or rather was self-created, and the members determined to send a flag to General Neville. It does not appear with what view the flag was to be sent; but it will not be presumed, when the evidence is silent, to be with a view to attack the General's house, to force a repeal of the excise law, or to compel the officer's resignation; and even the fact itself is only proved by one witness. Besides, the conduct of the committee, however culpable, will not be sufficient to involve the whole assembly in the guilt of treason. It is true, that the prisoner expressed his willingness to reconnoitre General Neville's house; but this expression, likewise, is only proved by one witness; and even if it were proved by fifty witnesses, it does not amount to an overt act of treason by levying war; nor does it appear that he even did reconnoitre, or furnish intelligence to the Committee. The proof against Porter (*ante*, p. 630) was as strong, and yet he was acquitted. Upon the whole, if the proceedings at Couche's Fort and General Neville's house must be considered as one action, that action must take its color, quality and character, from what was done at the latter place; and as there are not two witnesses to the overt act committed there, it is immaterial what was the conduct of the prisoner at Couche's Fort. The perpetration is the gist of the crime; and he only is to be adjudged guilty, who joined in the actual perpetration.

*Mr. Bradford.* It is essential to the security of life, liberty and property, that the powers of government should exist under some modification; and under whatever modification they exist, an attempt to defeat or destroy them, must be treason. If, however, the principles asserted in the course of the prisoner's defense should prevail, a flagrant attempt to obstruct the legitimate operations of the government to prevent the execution of its laws, and to coerce its officers into a dereliction of their trusts, must no longer be regarded as high treason. Every man engaged in the administration of the public affairs has erred, in considering the insurrection as anything more than a common, contemptible riot. Vigol, who has been convicted, ought to have been acquitted; and

all the prisoners committed upon the same charge, ought instantly to be released. But this doctrine and its consequences will not be found compatible with our constitution, and cannot receive the countenance of a court of justice.

To proceed, however, in a more minute analysis of the defense; it has been argued, that Congress has provided a specific punishment, for the offense of resisting or obstructing the service of process, obviously distinguishing it from treason; and that it is as much treason to resist the execution of one law as another; to resist the marshal of a court, as much as the supervisor of a district. The analogy is, in a great measure, just; in either case, if the resistance is made by a few persons, in a particular instance, and under the impulse of a particular interest, the offense would not amount to high treason; but if, in either case, there is a general rising of a whole county, to prevent the officer from discharging his duty in relation to the public at large, the offense is unquestionably high treason. Thus an opposition was lately made to the appointment of a particular judge in Mifflin county, and he was forcibly driven from the bench; but the offense was prosecuted merely as a riot, upon this principle of discrimination, that the design was not to prevent the governor from appointing any judge, but only to displace an unpopular individual.

Again, it has been urged, that the criminal intention must point to the suppression of all the excise offices in the United States, or it cannot amount to high treason. If it is meant by this argument that the insurgents of Pennsylvania must have contemplated a march from Georgia to New Hampshire, it is extravagant and absurd; but, in another view, it is perfectly correct; for, if it was intended that, by their lawless career and example, Congress should be forced into a repeal of the obnoxious law, it necessarily followed, that from the same cause, the offices of excise would be suppressed throughout the Union. That universality of object, which the books require, was inseparable from the nature of the opposition, for it was impossible to contemplate the repeal of the excise



law in one survey, or in one State, without effecting it in every survey and in every State.

The truth is, however, that the insurgents did not entertain a personal dislike for General Neville, but in every stage of their proceedings at Couche's Fort, at the General's house, and at Braddock's Field they were actuated by one single traitorous motive, a determination if practicable, to frustrate and prevent the execution of the excise law. The whole was one great insurrection, and it is immaterial at what point of time or place, from its commencement to its termination, any man became an agent in carrying it on. Many persons, indeed, may have attended innocently at Couche's Fort (as was the case with Porter), but those would not remain long after the purpose of the meeting was developed. To render any man criminal, he must not only have been present, but he must have taken part with the insurgents; yet, whether he was present at Couche's Fort, or the march to General Neville's, or at the burning of the General's house, if his intention was traitorous, his offense was treason. 3 Inst. 9. The overt act laid in the indictment (which is drawn from the most approved precedents) is levying war; and war may be levied, though not actually made. Fost. 218. It is agreed that this overt act must be proved by two witnesses; but there is a difference as to what constitutes the act itself. Now it is manifest from every authority, that to assemble in a body armed and arrayed for some treasonable purpose, is an act of levying war; this was the case at Couche's Fort, and the prisoner's active attendance there is proved by a number of witnesses. It is not required that every witness should have seen him at the same spot, at the same moment and in the same act, but if they see him at the place and time of rendezvous, exhibiting the same species of traitorous conduct, the law is satisfied. The conspiracy to levy war being effected, all the conspirators are guilty, though they did not all attend at General Neville's house. 1 Hale P. C. 132. Fost. 213, 215. Besides, the meeting at Braddock's Field is a distinct and substantive act of treason; and the prisoner is proved by

four witnesses to have been there. The design of the meeting was avowedly to oppose the execution of the excise law, to overawe the government, to involve others in the guilt of the insurrection, to prevent the punishment of the delinquents, to banish unpopular individuals from the town, and to attack the garrison of Pittsburg. The hasty declarations of the *quo animo*, proceeding from the prisoner himself, ought not to have much weight, were they not so strongly corroborated by other testimony.

PATERSON, JUSTICE. Gentlemen of the jury. The first question to be considered is, what was the general object of the insurrection? If its object was to suppress the excise offices and to prevent the execution of an act of Congress, by force and intimidation, the offense in legal estimation is high treason; it is an usurpation of the authority of government; it is high treason by levying of war. Taking the testimony in a rational and connected point of view, this was the object. It was of a general nature, and of national concern. Let us attend for a moment to the evidence. With what view was the attack made on General Neville's house? Was it to gratify a spirit of revenge against him as a private citizen, as an individual? No! as a private citizen he had been highly respected and beloved; it was only by becoming a public officer that he became obnoxious, and it was on account of his holding the excise office alone, that his house had been assailed, and his person endangered. On the first day of attack, the insurgents were repulsed, but they rallied, returned with greater force, and fatally succeeded in the second attempt. They were arrayed in a military manner; they affected the military forms of negotiation by a flag; they pretended no personal hostility to General Neville; but they insisted on the surrender of his commission. Can there be a doubt, then, that the object of the insurrection was of a general and public nature?

The second question to be considered is, how far was the prisoner traitorously connected with the insurgents? It was proved by four witnesses, that he was at Couche's Fort, at

a great distance from his own home, and that he was armed. One witness proves, positively, that he was at the burning of General Neville's house; and another says, "it runs in his head that he also saw the prisoner there." On this state of the facts, a difficulty has been suggested. It is said, that no act of treason was committed at Couche's Fort; and that however treasonable the proceedings at General Neville's may have been, there are not two witnesses who prove that the prisoner was there. Of the overt act of treason there must, undoubtedly, be proof by two witnesses; and, it is equally clear that the intention and the act, the will and the deed, must concur; for, a bare conspiracy is not treason. But let us consider the prisoner's conduct in a regular and connected course. He is proved, by a competent number of witnesses, to have been at Couche's Fort. At Couche's Fort the conspiracy was formed, for attacking General Neville's house, and the prisoner was actually passed on the march thither. Now, in Foster 213, the very act of marching is considered as carrying the traitorous intention into effect, and the jury (who will sometimes find the most positive testimony contradicted by circumstances, which carry irresistible conviction to the mind) will consider how far this aids the doubtful language of the second witness, even as to the fact of the prisoner's being at General Neville's house.

On the personal motive and conduct of the prisoner, it would be superfluous to make a particular commentary. He was armed, he was a volunteer, he was a party to the various consultations of the insurgents, and in every scene of the insurrection, from the assembly at Couche's Fort to the day prescribed for submission to the government, he makes a conspicuous appearance. His attendance, armed, at Braddock's Field, would of itself amount to treason, if his design was treasonable. Upon the whole, whether the conspiracy there, and the proceedings at General Neville's house, are considered as one act (which is, perhaps, the true light to view the subject in), the prisoner must be pronounced guilty. The consequences are not to weigh with the jury—it is their prov-

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ince to do justice; the attribute of mercy is placed by our Constitution in other hands.

The *Jury* returned a verdict of *guilty*.<sup>†</sup>

<sup>†</sup>The prisoner was pardoned; and the President afterwards granted a general amnesty to all the insurgents, who were not objects of depending prosecutions. For the President's proclamation of pardon, see 12 Sparks' Wash. 134.

## THE TRIAL OF WILLIAM VIGOL FOR TREASON, PHILADELPHIA, PENNSYLVANIA, 1795.

### THE NARRATIVE.

William Vigol was another of the insurgents who pleaded not guilty and whose trial has come down to us in an official report (for the full story of the insurrection, see *ante*, p. 620). But his activity in the insurrection was so clear that after hearing the evidence his counsel did not attempt to address the jury in his behalf and it being submitted to them without argument on either side, he was found guilty, but later had the benefit of the general amnesty which the President granted to all those who had taken part in the whisky rebellion.

### THE TRIAL.<sup>1</sup>

*In the United States Circuit Court, Philadelphia, Pennsylvania, June, 1795.*

HON. WILLIAM PATERSON,<sup>2</sup> Judge.

*June 12.*

The prisoner indicted for treason in levying war against the United States pleaded *not guilty*.

*Mr. Rawle*,<sup>3</sup> for the United States.

*Mr. Lewis*<sup>4</sup> and *Mr. Levy*,<sup>5</sup> for the Prisoner.

### THE EVIDENCE.

The prisoner was one of the most active insurgents in the western counties of Pennsylvania, and had accompanied the armed party, who attacked the house of the excise officer (Reigan's) in Westmoreland with guns, drums, etc., insisted upon his surrendering his official papers, and extorted an oath from him, that he would never act again in the execution of the excise law. The same party then proceeded to the house of Wells, the excise officer, in Fayette County, swearing that the excise

<sup>1</sup> *Bibliography.* See *ante*, p. 625.

<sup>2</sup> See 4 Am. St. Tr. 638.

<sup>3</sup> See 4 Am. St. Tr. 624.

<sup>4</sup> See *ante*, p. 6.

<sup>5</sup> See 4 Am. St. Tr. 639.

law should never be carried into effect, and that they would destroy Wells and his house. On their arrival, Wells had fled, and concealed himself; whereupon they ransacked the house, burned it, with all its contents, including the public books and papers, and afterwards discovering Wells, seized, imprisoned, and compelled him to swear that he would never act again as excise

officer. Witnesses were likewise examined to establish that the general combination and scope of the insurrection, were to prevent the execution of the excise law by force; and in the course of the evidence, the duress of the marshal of the district, the assembling at Couche's, the burning of General Neville's house, etc., were prominent features.

*Mr. Levy* and *Mr. Lewis*, and the Attorney of the District, agreed without argument, to submit to the decision of the jury, under the charge of the Court.

**PATERSON, JUSTICE.** Gentlemen of the jury. The first point for consideration is the evidence which has been given to establish the case stated in the indictment; the second point turns upon the criminal intention of the party, and from these points (the evidence and intention) the law arises.

With respect to the evidence, the current runs one way. It harmonizes in all its parts. It proves that the prisoner was a member of the party who went to Reigan's house, and afterwards to the house of Wells, in arms, marshaled and arrayed, and who, at each place, committed acts of violence and devastation.

With respect to the intention, likewise, there is not, unhappily, the slightest possibility of doubt. To suppress the office of excise, in the fourth survey of this State, and particularly in the present instance, to compel the resignation of Wells, the excise officer, so as to render null and void, in effect, an act of Congress, constituted the apparent, the avowed object of the insurrection, and of the outrages which the prisoner assisted to commit.

Combining these facts and this design, the crime of high treason is consummate in the contemplation of the constitution and law of the United States.

The counsel for the prisoner have endeavored in the course of a faithful discharge of their duty, to extract from the witnesses some testimony which might justify a defense upon

the ground of duress and terror, but in this they have failed, for the whole scene exhibits a disgraceful unanimity and with regard to the prisoner he can only be distinguished for a guilty pre-eminence in zeal and activity. It may not, however, be useless on this occasion to observe that the fear which the law recognizes as an excuse for the perpetration of an offense, must proceed from an immediate and actual danger, threatening the very life of the party. The apprehension of any loss of property, by waste or fire, or even an apprehension of a slighter remote injury to the person, furnish no excuse. If, indeed, such circumstances could avail, it would be in the power of every crafty leader of tumults and rebellion to indemnify his followers, by uttering previous menaces; an avenue would be forever open for the escape of unsuccessful guilt; and the whole fabric of society must inevitably be laid prostrate.

A technical objection has also been suggested in favor of the prisoner. It is said that the offense is not proved to have been committed on the day, nor the number of the insurgent party to be so great as the indictment states. But both these exceptions, even if well founded in fact, are immaterial in point of law. The crime is proved, and said to have been committed before the charge was presented; and whether it was committed by one hundred, or five hundred, cannot alter the guilt of the defendant. If, however, the jury entertains any doubt upon the matter, they may find it specially.

The court having waited about an hour for the jury (till half past 10 o'clock at night) adjourned till 11 o'clock the next morning. Just after the adjournment took place, the jury requested to see Foster's Crown Law and the Acts of Congress, which, by consent, were accordingly sent to them. I am told (says Mr. Dallas) that they remained together till between 3 and 4 o'clock in the morning, when they wrote, signed and sealed up their verdict and adjourned. On the next morning (the 23d of May, 1795) they appeared at the bar; and, being called over, offered the written verdict, sealed up, to the clerk. But the court said that the paper could not be received. The foreman then pronounced the verdict of guilty, *viva voce*, and again offered the written verdict; but the court repeated, "we cannot open or receive it." Nothing was said publicly of the jury's having adjourned.

The prisoner was eventually pardoned.

THE TRIAL OF CHARLES HAZELTINE FOR  
EXHIBITING IN PUBLIC AN ANTIQUE  
STATUE. NEW BEDFORD,  
MASSACHUSETTS. 1873.

THE NARRATIVE.

Charles Hazeltine was the proprietor of an art store in the city of New Bedford, Mass., and in his window there were always to be seen pictures, china, statues and other works of art. He had bought in Boston a copy in plaster of a celebrated statue, the original of which was in the museum at Naples, called "Narcissus listening to Echo," and one afternoon he placed this in the window. But the good people of this New England town were not used to nude figures either in marble, bronze or plaster, and very soon the sidewalk was crowded with old and young, gazing at the unaccustomed sight. Presently the marshal came along and ordered it out. Mr. Hazeltine took it out but the next day put it back. Then the town marshal seized it, declaring that it was an indecent exhibition, arrested the proprietor and charged him in the police court with breaking the law. In this tribunal he was held for the grand jury, which afterwards indicted him. On the trial he showed that the statue was a copy of what was considered by artists as a great work of art and was in no sense obscene or indecent. And the jury not being experts on the subject could come to no agreement, and were discharged without finding a verdict.

THE TRIAL.<sup>1</sup>

*In the Superior Court of New Bedford, Massachusetts, December, 1873.*

HON. JOHN W. BACON,<sup>2</sup> Judge.

<sup>1</sup> *Bibliography.* \*"Narcissus Scrap-Book, containing an account of the Seizure of a Nude Statuette by the City Marshal of New Bedford, the Trial of the Owner, His Suit against the Marshal, and Comments of the Press. Edited by C. Hazeltine. New Bedford: E. Anthony & Sons, Printers. 1873."



In the Police Court of New Bedford,<sup>3</sup> before Judge Borden,<sup>4</sup> on Thursday, October 16th, Charles Hazeltine was charged with exhibiting a lewd and lascivious statue in the window of his store on the 13th inst., and pleaded not guilty.

H. M. Knowlton<sup>5</sup> appeared for the prosecution, and L. T. Willcox for the defense.

Several policemen testified to the presence of the statue in the window.

*John W. Nickerson.* Am city marshal, first saw the image Sunday afternoon. Mr. Tripp called my attention to it; it was in the window. Sunday evening I met Mr. Hazeltine on Purchase Street and told him the image must be removed. It was not in the window Monday morning. Learning it was there Monday afternoon, I went and seized it. Mr. Hazeltine was not there at that time.

*Cross-examined.* Mr. Hazeltine is a man of good character; am not prepared to say whether I would keep a Narcissus in my parlor; if I had no family but my wife, perhaps I would; with children, perhaps I would not.

*Mr. Willcox* said the Commonwealth must prove the respondent a willful offender to make out a case. The intent to violate the statute was not shown, and it seemed an outrage that a person should be arrested for exhibiting one of the most beautiful myths of the ancients, materialized in marble.

THE COURT said it appeared to be made out that the image was intentionally exhibited by the respondent.

<sup>3</sup> BACON, JOHN WILLIAM. (1818-1888.) Born Natick, Mass. Graduated Harvard, 1843; taught in English High School, Boston; admitted to Middlesex Bar, 1846; practiced law (Natick) fourteen years; member State Senate, 1859-1862; Chief Justice Municipal Court of Boston, 1866; Associate Justice Superior Court, 1871-1888. Died while holding court at Taunton. See Davis (Wm. T.), Bench and Bar of Mass., I, 421; Biographical Review, Middlesex Co., Mass.; Williams (Henry Clay), Biographical Encycl. of Mass.

<sup>4</sup> See also the civil suit, *post*, pp. 650-655.

<sup>5</sup> BORDEN, ALANSON. (1823-1900.) Born Tiverton, R. I. Academic education; Teacher. Removed to new Bedford, Mass., 1846, and studied law; admitted to bar, 1850, and settled in New Bedford. Special justice police court, 1856-1859; member state legislature, 1859-1860; trial justice for juvenile offenders, New Bedford; judge city Police Court, 1864-1874, when the Police Courts of the county were abolished (1874) and the county divided into three districts with one judge for each, he was appointed to the Third District; elected Mayor of New Bedford, 1876; retired from bench, 1897.

See Reno (Conrad). *Memoirs of the judiciary and the bar of New England.* Vol. I. Davis, W. T. Bench and bar of Massachusetts II. Bacon, Edwin M., *Men of Progress—Massachusetts.* Ellis, *History of New Bedford and vicinity.* New Bedford Direct, 1899-1900.

*Charles Hazeltine.* Am the respondent; am a music dealer, and also a dealer in works of art; am honorary local secretary and an agent of the Art Union of London, and agent for another art union in London; bought the Narcissus in Boston on Friday, and put it in my window for sale and exhibition. Mr. Nickerson met me Sunday night, and told me to take "those things" out of my window. Went to the store and changed the position of some of them; frequently rearranged the articles in my window. The Narcissus is a beautiful work of art. In my opinion, it is a chaste and pure figure; have sold similar figures; most I have sold in New Bedford have been to ladies.

*Cross-examined.* Never sold a Narcissus. Sunday night after Mr. Nickerson spoke to me I set the Narcissus farther back; replaced it Monday morning. The gas was turned low Sunday evening in the shop window; the image did not have a specially prominent position in the window; nothing stood in front of it. I sleep in the back shop.

To the COURT. The image is entirely nude, a male youth; the sexual organs are represented. The nude images I have sold to ladies did not have the sexual organs represented. I put the Narcissus out of the window temporarily as a concession to the ignorant and vicious taste of a certain class of people, and replaced it because I thought I ought not to make such a concession.

*Capt. John A. Hawes.* Among ladies and gentlemen of culture, the Narcissus would not be deemed immodest; in my parlor is an infant Christ, a very fine one, in which the sexual organs are more prominent than in this; the Narcissus, in my opinion, is a proper image to exhibit in an art gallery or in my parlor, but perhaps not to exhibit to people of immoral tendency. I might question the propriety of exhibiting it to the public, but still I do not see how it could have an immoral tendency. It is perfectly cold and passionless. A change could be made in the expression of the countenance or the attitude of the limbs, that would make it a lascivious figure.

*John Hopkins.* Am a dealer in music and fancy goods; have dealt in statues; have a family of four children, of two to twelve years; while I would not purchase this statue, if anybody will give me one, I will place it prominently in my parlor.

\* KNOWLTON, HOSEA MORRELL. (1847-1902). Born Durham, Me. Graduated Tufts Coll., 1867; studied law in New Bedford and at Harvard; admitted to bar, in 1870; had an office in Boston for one year, then located in New Bedford. Register in bankruptcy for First District, 1872-1878; City Solicitor, New Bedford, 1875; member State Legislature, 1876; State Senator, 1879; District Attorney Southern District Massachusetts, 1879-1894; Attorney-General, Massachusetts, 1893. See Ellis, History of New Bedford; Our County and Its People (Bristol Co.); Hurd, History of Bristol Co.; Tufts College register alumni.

*William Bradford.* Am an artist. Capt. Hawes has expressed my ideas.

To the COURT. Cannot say that I would recommend one to place the Narcissus in a grammar school; would have no objection to place the figure in my house. If I had a daughter of an unfortunate turn of mind, I would not have the image where she would habitually see it. Perhaps I would not have so much objection to a female bust, though that could be made voluptuously offensive.

*Orlando J. Marvin.* Have been in the business of fine arts 28 years; have children; do not see anything indelicate about the Narcissus.

*Mr. Willcox* argued that to make out this case the respondent must be proved to have made an exhibition, in the words of the statute, "manifestly intended to corrupt." Some might say that obscene literature can be found in the Bible or Shakspeare, but nobody can be indicted for selling them. It would be a shame and an outrage if refinement, education and culture must bend to accommodate prurient and impure tastes. Any person who can read the beautiful story of Narcissus and then look on this figure with anything but the loftiest sentiment must be already corrupt.

*Mr. Knowlton* thought *Mr. Hazeltine* was not ingenuous. He testified that he frequently rearranged the statuettes in his window, but in response to the requests of the officers he moved the Narcissus only, and then on Monday replaced it, in just such a position as would most conspicuously show its indecent points. If he thinks he is right, he should say so, and not say he didn't mean to do wrong. The law covers things manifestly tending to corrupt the morals of youth, not such as would corrupt the morals of Messrs. Hawes, Bradford, and Hopkins. *Mr. Hazeltine* is evidently trying to go to the extreme edge of the law. Some of the gentlemen testify that the bust of a woman is just as objectionable, but the children just waking to a new life as men and women pass by busts and collect round the Narcissus. They do not look at it for its artistic beauty or on account of the beautiful mythical story of Narcissus. And *Mr. Hazeltine* exhibited it on purpose to draw their attention. If he is allowed to go on, will he not fill his window with sexual organs in all positions? If art is allowed to make itself immodest, why shall not literature claim the same right?

The COURT held that the respondent was probably guilty, and ordered that *Mr. Hazeltine* give \$200 bail, with Capt. Hawes as surety, to appear at the Superior Court and meantime keep the peace and be of good behavior.

In the same court, November 3rd, the civil case of *Charles Hazeltine v. John W. Nickerson*, tort for the conversion of a statuette of Narcissus, was taken up, *L. T. Willcox* appearing for the plaintiff, and *E. L. Barney*\* for defendant.

\*BARNEY, EDWIN LUTHER. (1827-1897.) Born Swansea, Mass. Attended Brown in class of 1858, and Yale Law School for a time;

The answer in the case set forth "that the statuette was an obscene, impure and indecent figure, manifestly tending to the corruption of the morals of youth; that the plaintiff had the same on exhibition in the front window of his store on William street in New Bedford, a public way much frequented; and so by exhibiting the same repeatedly attracted and gathered great numbers of men, women and children in said street, and rendered the same inconvenient and impassable for public travel; and so the said statuette, so exhibited, became and was a common nuisance, and the defendant abated it as by law he ought and had a right to do." The answer also set forth, that the defendant is a justice of the peace for the county of Bristol and marshal of the city of New Bedford, and under the state of facts above named, justified the act of taking under the powers by law appertaining to him by virtue of his holding the said offices respectively. And the answer further set up that the possession of the statuette by the plaintiff at the time of the taking was unlawful, being for the purposes of public exhibition and sale, and so the plaintiff could not maintain any action against the defendant on account of the same. To this answer the plaintiff demurred, and issue was joined by the defendant upon the demurrer.

*Mr. Willcox* said the case would not be tried in this court on the facts. He proposed to argue it on the demurrer, and if the court should overrule the demurrer, the plaintiff would drop the case or take it to another court.

He argued that the answer did not make a case for defendant, even if it were granted that the statue was obscene. He read from the law on which *Mr. Hazeltine* was tried on criminal process, and the second section of the act provided for the seizure on search-warrant of figures tending to corrupt the morals of youth. The suit against *Mr. Nickerson* was served on him before the warrant was made against *Hazeltine*. The seizure of the statue was made before any warrant was issued, and without right. It is a new doctrine that a statue of *Narcissus* is a common nuisance, but if it is, the marshal has no right to seize it without a warrant when the law provides the manner in which obscene figures shall be seized, viz., by search-warrant. This statue was taken without any process of law, or shadow of right or authority. The rights of property are sacred, and the stock in trade of the meanest rumseller, keeping a liquor nuisance of magnificent proportions, and through whose acts indirectly every crime in the calendar is committed, cannot be seized without a warrant.

*Mr. Barney* said that the demurrer, not denying that the statue

admitted to bar (Taunton) 1856; settled in New Bedford. State Senator, 1866-1867; Judge Advocate on Gen. Butler's staff, 1869-1875; president New Bedford bar association from its organization until his death. 32d degree Mason. See Our County and Its People (Bristol Co.); Davis, Wm. Thos., Bench and Bar of Massachusetts.

is obscene, virtually admits it for the purpose of this trial. The question is, can the city marshal, who is also a justice of the peace, abate a nuisance of this kind? Anybody, the humblest mind, common sense, decides that he can. No matter about the law. If a wild man is in the streets naked, cannot an officer abate that nuisance without a warrant? Common sense and the law say yes. If the statue is too indecent to be seen in court, it is a nuisance when exhibited in a public street, where the standard of morals is no higher than it is in this city. And it was a nuisance in another sense, for it caused an obstruction of the street. A man who is riding unnecessarily on the Lord's day, and injured by a defect in the highway, cannot maintain an action for damages against the town or city having charge of the highway. And a seller of coal cannot recover if the coal was not weighed. So a man who exhibits an obscene figure ought not to recover for the seizure of the figure. Any person has a right to abate a nuisance which invades his rights. The fact that a man abates a public nuisance is sufficient to show that it is an invasion of his private rights. Whatever a justice of the peace sees, that is a violation of the law, he has a right to abate, just as much as he has a right to issue a warrant on the oath of another person for its abatement. Whatever a man sees, he knows better than from information on oath, and whatever power he delegates, he may exercise personally.

*Mr. Willcox* said he had admitted the statue to be obscene, only for the purpose of this argument on a question of law. The opposing counsel had erred in confounding public with private nuisances. Those who are injured in their private rights by a public nuisance, for instance the wives of drunkards who spend their earnings at a common nuisance, and who in consequence of that nuisance drive their families to want, prostitution, or death, have no right to abate that nuisance. An obstruction of a private way, or the overflow of filth, is a private nuisance, and the private party obstructed or injured has a right to abate it. *Narcissus* did not obstruct the sidewalk; he asked nobody to stop and look at him; and if the street was obstructed the marshal ought to have arrested the boys and girls who obstructed it.

On the 10th November, JUDGE BORDEN gave his decision in favor of the defendant. He said:

As this action is intimately connected with the criminal case already heard, growing out of the same subject matter and in regard to which there appears to exist a considerable degree of misapprehension both as to the facts and as to the grounds upon which my decision was based, I avail myself of the opportunity now presented, before passing to the particular consideration of the case immediately before me, of reviewing, as briefly as I may, the proceedings in the criminal case, in order that my position with reference to the whole matter may at least be clearly understood.

The criminal complaint against the present plaintiff was founded upon a statute of the Commonwealth, providing for the punishment of any person having in his possession for the purpose of sale or ex-

hibition, among other things named, any obscene, indecent or impure figure manifestly tending to the corruption of the morals of youth. Now the object of the statute, definitely expressed, is, to guard the morals of youth from corruption; and in determining whether an offense has been committed under it, obviously not only the character of the figure itself or other articles alleged to have been kept for sale or exhibition, but also the time, place, and all the material circumstances of the alleged keeping should be considered. And first, as to the figure itself. Not regarding for the present those characteristics which depend for their manifestation upon a knowledge, on the part of the observer, of the story which the statue is intended to illustrate, and describing it as it appears to an ordinary observer, it is an image, standing about two feet high above its pedestal, apparently designated to represent a youth of about the age of sixteen years, graceful in form and natural in mien and attitude, but entirely nude, and with all the external organs, sexual included, exhibited in relative proportions.

As to the material of which it is composed, it might be supposed from the importance which has been attached to it, and from the glowing terms in which it has been characterized as a work of art by persons who have seemed to be more anxious to express their sympathy for Mr. Hazeltine as against Mr. Nickerson in this controversy, than to make known the facts—that it is a work wrought in marble, or at least composed of Parian dust, or of some other of the choice and expensive material of which the better specimens of statuary are made; instead of which it is of common plaster of Paris, run in a mould, and in this respect indistinguishable from the best samples of similar productions dispensed by itinerant image vendors about our streets. The scholar versed in ancient mythology might, to be sure, see in it only Narcissus at the Fountain; and the cultured lover of beautiful and symmetrical forms in nature might see in it only beauty and symmetry; but the mass of people would see in it only the representation in plaster such as I have described. Now the testimony in the case showed that the plaintiff purchased the figure and placed it in a conspicuous position in the front window of his store, opening directly upon one of the most public streets of the city, for the avowed purpose of selling it and of calling attention to other works of art there exhibited; that while thus exposed, crowds of people at different times collected about the window, requiring the interference of the police in order to prevent the obstruction of the sidewalk; that the persons thus congregated consisted mostly of young men, boys and girls, evidently attracted to the place not by the beauty or other elevating quality of the figure, but by the vulgar curiosity which its sexual exhibition excited; that the attention of the plaintiff was directly called on two separate occasions, by members of the police force, to the effect which the unusual exhibition was producing; that on one of these occasions the officer suggested to him that the figure should be draped, and on the other, that it should be removed from the window, and that in consequence he did remove it for a short time, and then replaced it; that inde-

pendently of these suggestions, he must have known from his own personal observation that the window of his store was not thus besieged from any good motive; yet in disregard of the recognized consequences he persisted in his course.

Now as I stated in substance at the trial, the case was to be decided not upon any ideal standard, but upon the facts considered with reference to the actual state of society in point of culture and refinement. That the question was not as to the propriety or impropriety of exposing such a figure in an art gallery, where it would mainly be observed by scholars and virtuosos, but whether, considering the prevailing type of intellectual and moral culture among the varied classes of persons thronging the avenues of a large city, it could rightfully be exhibited upon one of the most public streets of such a city. In this connection I took occasion to remark upon what I consider a false system of education which prevails upon one of the most important of all subjects, which instead of providing means to secure to young people of both sexes in a pure form and when they arrive at a proper age, scientific information with reference to the anatomy and physiology of the sexual organs and the relations of the sexes to each other, leaves them without direction to seek it whenever the impulses of nature may prompt them to do so, and from such sources as chance may throw in their way, with the natural and almost inevitable result, that they obtain it more or less mingled with impurity; and with minds thus poisoned and vitigated, it is not surprising that the view even of some of the noble and genuine works of art often excites in the emotions in which the sensual elements are largely commingled, with of course the debasing effects correspondingly increased as the object declines in the scale of decency. Certainly with such a system of education as this, the morals of youth should not be deprived of any of the safeguards of which they have hitherto had the benefit; and if the knowledge and love of high art cannot be inculcated without the exhibition of nude human forms, let us at least so change the character of our system of education, that culture in one direction shall not necessarily lead to debasement in another.

In giving my decision in the case it seemed to me that the line between purity and decency on the one hand, and impurity and indecency on the other, should be drawn somewhere; and that if this figure, under the circumstances described, was not to be classed under the latter division, but its exhibition tolerated, there was no reason why, after a time, enlarged copies of the same, slightly changed to answer the new purpose, might not replace those uncouth, though in my judgment less objectionable figures, which standing in front of cigar shops upon our streets, extend their unsought and in many cases unwelcomed invitations to the passers-by; and so, under changed conditions and modified forms, it seemed to me difficult to determine what unhallowed purposes this figure might not eventually be made lawfully to subserve. In view, therefore, of all the considerations thus presented, it seemed to me that there was probable cause to believe that an offense under the statute had been committed. and that

the case was one eminently proper for the consideration of a jury; and, therefore, in the exercise of my judgment and discretion, I ordered the respondent to recognize for his appearance at the Superior Court.

*December 30.*

Charles Hazeltine, after being held for trial in the police court, had been indicted by the grand jury for exhibiting in public (in the window of his store) in the city of New Bedford, an indecent statue. The figure in question was a copy in plaster, of an antique bronze statuette twenty-six inches in height, discovered at Pompeii, and in the Museo Nazionale of Naples. It is sometimes named "Narcissus at the Fountain." Although the position of the head might imply gazing into the water, yet its turn, the attitude of the body, the position of the left, and especially of the right arm and hand, suggests listening. Therefore it is inferred that the youth is listening to Echo, who for him pined away and died, and it is better named "Narcissus listening to Echo."

*George Marston*,<sup>7</sup> District Attorney, for the Commonwealth.

*Lemuel T. Willcox*,<sup>8</sup> for the Defendant.

The following Jury was selected and sworn: Zenas L. Adams and Benjamin Cole, New Bedford; Charles M. Gustin, Attleborough; Meltiah Hathway, New Bedford; Albert Jenney, Fairhaven; David Malcom, Fall River; John N. Munroe, Rehoboth; Cornelius C. Peck, Seekonk; Joseph H.

<sup>7</sup> MARSTON, GEORGE. (1821-1883.) Born Barnstable, Mass. Studied law at Harvard; admitted to bar 1845. Practiced law (Barnstable). Register of Probate, Barnstable Co., 1853; Judge of Probate, 1854-1858; District Attorney Southern District, 1860-1878; Attorney-General, 1879-1880. In 1869, upon the death of Joshua C. Stone, of the firm Stone & Crapo, Judge Marston removed to New Bedford and the firm Marston & Crapo was formed. President Nantucket and Cape Cod Steamboat Company; director of Old Colony R. R. Co., Citizens' National Bank of Bedford, and Quincy Mutual Fire Insurance Co. See Ellis, W. B., *History of New Bedford and Vicinity*. Hurd, D. H., *History Bristol Co., Massachusetts*. Davis, W. T., *Bench and Bar of Massachusetts*, 1:332.

<sup>8</sup> WILLCOX, LEMUEL TRIPP. Born Fairhaven, Mass., 1835. Graduated Yale 1860; admitted to Bristol Co. bar, 1862; practiced at New Bedford. See Davis, Wm. T., *Bench and Bar of Massachusetts*, II; Hurd, D. H., *History of Bristol Co.*; Yale Cat.; Ellis, W. B., *History of New Bedford and Vicinity*; *New Bedford Direct*, 1915.



Philbrick, Taunton; John H. Sisson, Westport; Orlando J. Thompson, New Bedford; Caleb B. Wetherell, Norton.

*Mr. Marston* said, the indictment was in two counts, one in statutory form, and one under the common law, both intended to describe the same offense. It was a novel case, because it is seldom in Massachusetts that such an offense is committed. A man cannot set up for himself a standard of decency, but must be governed by general opinion. It may be proper for such works of art to be kept in art galleries, and some may be so refined as to keep them in their houses without offense; but it must not be allowed on the public streets. It strikes at the foundations of society and civilization. And in this case it is the more flagrant, because the defendant had removed the statue on the direction of the police, and then replaced it in the window.

#### THE EVIDENCE FOR THE COMMONWEALTH.

*John W. Nickerson.* Am city marshal. Saw the figure in defendant's window; complaint was made to me; I saw the figure on Sunday afternoon, Oct. 12; the window was lighted Sunday night; met Mr. Hazeltine in the street Sunday night and told him to remove "those figures" meaning divers, vases, busts, statues and vases in plaster and bronze and statuary porcelain; the indecent figure of Narcissus was not in the window early Monday morning, but complaints were made again Monday afternoon that children were round the window, and I then went and seized it, on account of the complaints and from my own sense of duty. On Sunday the Narcissus was placed so as to point at a nude female figure. The civil suit against me was commenced before the warrant against Hazeltine was made, I did not threaten, when the writ was served on me, to "go for Hazeltine"; have

not stated that I would be willing to have the Narcissus in my house if I had no children.

*Cross-examined.* There are other figures in the store I should object to. Sunday evening was the first time I saw him in relation to the matter; had no legal process of law when I took the image; the children were looking into the window at this image. Can't remember any remarks that were made by the children, but thought they were about this image; I identify this image in court as the one in the window.

*Daniel P. Lewis.* Am a New Bedford policeman; saw the exhibition of the figure; the crowd around the window, and I suggested to Hazeltine to veil the image; Hazeltine removed it from the window, on Saturday evening. Never saw such a crowd of children round Hazeltine's window before.

*Mr. Willcox*, for the defense, said that nowhere had the delicacy and modesty of youth been more sacredly guarded than in our own state. The case is not to be treated lightly. It is of great importance, for he who corrupts the morals of youth is guilty of crime most foul. The jury is to consider whether the figure is indecent. The prejudices of an individual lead him sometimes to pronounce works of art indecent. He might bring thousands of heads of families to testify that this image was not, in their view, indecent, and that they would willingly place it in their houses, but the image tells its own story. The respondent is a man stainless in character, whose life has been passed as a worshipper at the shrine of literature and art. This man, whom we have been glad to receive in our families, is now on trial for wilfully and malicious exhibiting an image manifestly tending to corrupt the morals of youth.

#### THE EVIDENCE FOR THE DEFENSE.

*Charles Hazeltine.* Am the defendant here. When Mr. Nickerson spoke about the image, I removed it, so as to avoid giving offense, and put it back after the Saturday night crowd had dispersed. The image Nickerson says this pointed at, was a Venus of Milo, a partially draped figure. The window was lighted Sunday night only a few minutes while I was writing at my desk, near the window. There was no complaint about the image from any source till Mr. Nickerson spoke. When he met me on Sunday evening he said "Those things must be taken out of your window." I made no re-

sponse. I put the image in the window for sale and on exhibition as a work of art.

*Cross-examined.* I live in my store; the gas in the window may have been lighted a few minutes for me to write at the desk on Sunday evening.

*John Tetlow.* Am principal of the Field's Academy; was called to testify as to the purity or impurity of the statue. The Court held that expert testimony in a question of that kind was inadmissible. *Mr. Willcox* asked whether witness saw similar figures in families where he visits as a teacher. The Court held the question inadmissible.

*Mr. Willcox* (to the jury). It was conceded that Mr. Hazeltine kept this store, and had this image for sale to any one who wished to buy. The question for the jury is, Did Mr. Hazeltine exhibit this image manifestly intending to cor-

rupt the morals of youth? He attached no further blame to the officers than that they exhibited an over officiousness in the matter. He proposed to discuss the question whether Mr. Hazeltine's exhibition of the image was with criminal intent. Is the image obscene, and does it manifestly tend to corrupt the morals of youth? It is in evidence that with the exception of the officers, no person remonstrated against the exhibition of the image during the forty eight hours it was in the store. Does any one imagine that the law makers of the state had in their minds the idea of prohibiting the sale of art images, when they framed the statute against the sale of indecent articles? He closed by reminding the jury of the consequences that might ensue to his client from a verdict of guilty.

The *District Attorney* said if the jury found a verdict of guilty, the exhibition of such things would be stopped, whether the penalty were imposed or not. It is absurd to talk about that botch as a work of art. If such instruments as that are necessary to teach art, then we don't want any art taught. We have got along very well without it in New England for many years, and we can in years to come. There is nothing in the case involving moral or religious differences. The consequences to Mr. Hazeltine's family are not to be considered, but this thought leads us to consider what are the consequences to other men's families. Mr. Hazeltine says he bought the image for exhibition, but in all deference to him, we say that the people of New Bedford don't want any such thing. He says he removed the image as the officer desired, but put it back after the boys dispersed. Did he remove it for any other reason than that he knew he was wrong? Were the boys about the window there studying art? It is evident that they were doing no such thing. There is no room for debate why this image attracted special attention, and drew a crowd of boys around the window. A glance at the image is a sufficient answer. The jury are to apply their sound judgment in the case, and decide whether the image is obscene or not. Perhaps it is proper to place it or a similar image in an art gallery or in

a private parlor, but placing it in full view on a public street is another thing. Are the gentlemen of the jury willing that such images should be exhibited in the villages where they reside? At this very term of the court, a drunken wretch was sentenced to the House of Correction for an indecent exhibition of himself, and is art superior to nature? Can a man carve such things in wood or marble or plaster, and be allowed to exhibit them in the name of art? What must have been the effect on the young, of the view of this image? Was it elevating or otherwise? There can be but one answer. Older persons, whose morals are fixed, might not be corrupted. To be pure, we say, all things are pure; but how about the rest? The old couplet about 'immodest words applies to the exhibition of this image:

Immodest words admit of no defense; for want of decency is want of sense.

No more important case had been acted upon at this term of the court. Could he perform but one more official act he would ask no better opportunity to do a great public good, than the privilege of aiding in the suppression of the exhibition of indecent figures.

JUDGE BACON. Gentlemen. To find a man guilty, the jury must be of the opinion that he is proved guilty beyond a reasonable doubt. The first count of the indictment is under the statute, and the other under the common law. It is not material on which count a verdict of guilty may be rendered; both are descriptions of the same act. It is not denied that the defendant had the image in his possession, and exhibited it, and it is for the jury to say whether the image is an obscene and indecent figure, manifestly tending to corrupt the morals of youth. An obscene figure is one that is offensive to good morals and chastity, and tends to cause impure thoughts. An indecent figure is much the same thing; it is one that violates decency and modesty. If it is obscene and indecent, it does manifestly tend to corrupt the morals of youth. A man intends what he does. If this man exposed an indecent figure, the law presumes that he intended to do it, and common sense warrants the same

presumption. If the jury have no reasonable doubt of the indecency of the image they must convict the defendant; if they have such a doubt, they must acquit.

The *Jury* retired, and the case was considered nine hours without agreement, they balloting 22 times. The first three ballotings were 8 for conviction and 4 for acquittal, and subsequently one more jurymen was for conviction.

At one o'clock on the morning of the 31st December the *Jury* announced that they could not agree and were discharged by the Court.

## THE TRIAL OF FRANK JAMES FOR TRAIN ROBBERY AND MURDER. GALLATIN, MISSOURI, 1883.

### THE NARRATIVE.

For several years prior to the civil war there existed a border warfare between what were known as the Kansas Jayhawkers and the Missouri Bushwhackers. This trouble was principally along the state line just south of Kansas City. The Jayhawkers were first organized for the purpose of capturing negro slaves in Missouri and taking them into Kansas; the Missouri forces were organized to meet these raids and the fight soon became very bitter. The Kansas men eventually begun to rob and plunder, and the Missouri men quickly took to retaliatory measures.

Among the Missouri men was one George Quantrell from Ohio. When the civil war broke out the Bushwhackers espoused the Southern cause and Quantrell became the leader of a guerilla band which became famous, and which included Jesse and Frank James, and the three Younger brothers. Quantrell was killed about the close of the war and a portion of the band formed a gang which for a number of years preyed upon banks and railroads and became the terror of several of the states, including Missouri, from the robbery of the bank at Liberty, Mo., in 1866, to the surrender of Frank James in 1882. They numbered about twenty, the leaders being the three Younger brothers, the two James brothers, Dick Liddil, and Clarence and Wood Hite.

In 1876 they went into Minnesota and attempted the robbery of the bank at Northfield, but they were routed by the citizens, several of the bandits were slain and the Younger brothers captured and sent to the penitentiary for life. They were now known as the James Gang and became outlaws,

hunted by the officers of the law, several of whom met their death in endeavoring to capture them. It is not the place here to record the banks they robbed, the bank officials they murdered, the trains they held up, the passengers and express messengers they robbed and killed, this is the story of their last adventure—the holding up of the train of the Chicago, Rock Island & Pacific Railroad, at Winston, Missouri, on the night of July 5, 1881, and the killing of the conductor Westfall and a passenger, Frank McMillan. The governor of Missouri offered a reward for the bodies of the bandits, dead or alive.

The pursuit became so hot in this state that several of them, including Frank James and Dick Liddil, voluntarily surrendered to the authorities and Jesse James about this time was killed by one of his comrades at St. Joseph, Mo. Frank James was brought to trial for the murder of McMillan, and Dick Liddil, who had turned state's evidence was the principal witness. James denied that he was present at this particular robbery, and the jury either believing his story or being afraid of the vengeance of his friends, found him not guilty.

### THE TRIAL.<sup>1</sup>

*In the Circuit Court of Daviess County, Gallatin, Missouri, August, 1883.*

HON. CHARLES H. S. GOODMAN,<sup>2</sup> Judge.

<sup>1</sup> *Bibliography.* \*"The trial of Frank James for Murder, with confessions of Dick Liddil and Clarence Hite, and history of the 'James Gang.' Published by George Miller, Jr., Water Works Building, Kansas City, Mo. E. W. Stephens, Columbia, Mo., 1898."

\*"Closing Speech for the State made by Wm. H. Wallace, Esq., Prosecuting Attorney of Jackson County, Mo., in the trial of Frank James for Murder, held at Gallatin, Daviess Co., Mo., in August and September, 1883. Published by Citizens of Gallatin, Missouri. Press of Ramsey, Millett & Hudson, Kansas City, Mo., 1883."

The St. Louis *Republican*, August 21 to September 7, 1883.

<sup>2</sup> GOODMAN, CHARLES HARPER SLAUGHTER. (1843-1917.) Born Zanesville, Ohio. Self-educated. Served with an Illinois regiment in Civil war and located in Albany, Mo., 1866; studied law with

August 20.

An indictment had been returned by the grand jury of Daviess County in May, against Frank James for the murder of Frank McMillan.

The prisoner had pleaded *not guilty*.

W. D. Hamilton,<sup>3</sup> Prosecuting Attorney; William H. Wallace,<sup>4</sup> J. H. Shanklin,<sup>5</sup> M. A. Low,<sup>6</sup> H. C. McDougall<sup>7</sup> and J. F. Hicklin,<sup>8</sup> for the State.

Judge G. W. Lewis and admitted to bar, 1868; edited *Albany Ledger* several years; Prosecuting Attorney, 1875-1879; Circuit Judge, 1881-1892; Public Administrator, 1910. Died in Albany, Mo.

<sup>3</sup> HAMILTON, WILLIAM DECATUR. (1849-1903.) Born St. Francois Co., Mo.; Educated in common schools and at Elmwood Academy, Farmington, Mo., and Normal school, Warrensburg, Mo.; admitted to bar (Warrensburg), 1872; attended St. Louis Law School, 1872-1873; began practice in Gallatin, and died there.

<sup>4</sup> WALLACE, WILLIAM HOCKADAY. Born 1848, Clark Co., Ky. Went with his family to Lee's Summit, 1857, but family were driven from Jackson Co. by order No. 11 (1863), and settled in Fulton, Mo. A. B. Westminister Coll. 1871; studied law with Judge John A. Hockaday, Fulton, Mo.; began practice at Independence, 1875; Prosecuting Attorney, Jackson Co., 1881-1884; judge of Criminal Court, Jackson Co., 1907-1908.

<sup>5</sup> SHANKLIN, JOHN HENDERSON. (1824-1904.) Born Monroe Co., Va., now West Va. Received a country school education; taught school; farmed on shares. Came to Trenton, Mo., 1846. Served in the Mexican war, 1847-1848; sent to St. Louis on Government business, 1848-1849; taught school at Trenton, 1849-1850; Judge Grundy Co., 1850; admitted to bar, 1851; member of firm, Shanklin, Low & McDougall, Gallatin, Mo., for ten years. President Missouri Bar Association, 1882; retired from practice, 1890. Died at Trenton.

<sup>6</sup> LOW, MARCUS AURELIUS. Born Guilford, Me., 1842. Educated at Academy, Auburn, Me., and Law School, University of Michigan. Located in Missouri soon after the Civil War; was a law partner of H. C. McDougall, Gallatin, Mo., 1874-1885. Moved to Topeka, Kansas, 1886; L. L. D. Bethany Coll. Topeka, 1901. President St. Joseph & Iowa R'y, 1886-1887; general solicitor, 1887-1892, Chicago, Kansas & Nebraska R'y, 1887-1892; Chicago, Rock Island & Texas, 1892-1900; Chicago, Rock Island & Gulf and of Chicago, Rock Island & Mexico R'y, 1902-1903; general attorney Chicago, Rock Island & Pacific R'y, 1892-1912. Delegate to the Republican National Conventions of 1876, 1900, 1904.

<sup>7</sup> McDOUGALL, HENRY CLAY. (1844-1915.) Born Marion Co., Va. Served in the Union Army and was mustered out in 1864; clerk in the United States Quartermaster's office, Gallipolis, Ohio and In-



*Judge John F. Philips,<sup>9</sup> James H. Slover,<sup>10</sup> John M. Glover,<sup>11</sup> Chas. P. Johnson,<sup>12</sup> C. T. Garner,<sup>13</sup> J. W. Alexander,<sup>14</sup> and William H. Rush,<sup>15</sup> for the Prisoner.*

dianapolis, Ind. 1865-1866; removed to Missouri 1867; admitted to bar, Gallatin, 1868; a partnership was formed 1874 with Marcus A. Low to which was soon added John H. Shanklin. This firm existed until 1885, when McDougall moved to Kansas City. 1886-1889 member of firm of Crittenden, McDougall and Stiles, afterwards of McDougall and Sebre; city counsellor Kansas City, 1895; president Missouri Bar Association, 1894.

<sup>9</sup> HICKLIN, JOSHUA FERGUSON. (1834-1908.) Born Ralls Co., Mo., shortly after his parents had moved to Missouri from Kentucky; educated in the public schools of Carrollton, Mo.; taught in country schools, studied law under Col. John B. Hale, Carrollton. After Civil war established his home and practice in Gallatin, Mo.; 1906, retired to a farm near Springfield, Mo., where he died.

<sup>9</sup> PHILIPS, JOHN FINIS. (1834-1919.) Born Boone Co., Mo. Matric. Univ. of Mo., 1851; graduated Center Coll. Ky., 1855. Returned to Mo. and studied law in Fayette and admitted to bar, 1857; was a Colonel in the Civil War where he served on the Union Side with distinction; at its close he began practice in Sedalia, Mo. and was a partner of Senator George Vest for ten years; Democratic member of 44th and 46th Congress; Commissioner Supreme Court Mo., 1883-1885; Judge Missouri Court of Appeals, 1885-1888; United States District Judge, 1888-1909; LL.D., Center Coll., Ky.; Central Coll., Mo., Westminster Coll., Mo., and Univ. of Mo.

<sup>10</sup> SLOVER, JAMES HORACE. (1838-1913.) Born Towanda, Pa. Studied law at Union Coll. Law, Chicago; removed to St. Louis, 1852; to Independence, Mo., 1864. Admitted to Bar, 1866; Judge Circuit Court, Jackson Co., 1885-1898. Died Independence, Mo.

<sup>11</sup> GLOVER, JOHN MILTON. Born St. Louis, 1852; educated at Washington University; admitted to St. Louis bar, 1875; representative from ninth Missouri district in 49th and 50th Congress (1885-1889). Now practices law in Denver, Colo.

<sup>12</sup> See 9 Am. St. Tr.

<sup>13</sup> GARNER, CHRISTOPHER TRIGG. (1825-1897.) Born Fayette, Mo.; educated in the log school-house of the day; taught school one term; clerked in a store; studied law in Richmond, Mo. (1845-1848), in the office of G. W. Dunn; circuit attorney 1852; member of General Assembly, Ray Co., 1862; was many years attorney for Santa Fe and Wabash Railways; died in Richmond.

<sup>14</sup> ALEXANDER, JOSHUA WILLIS. Born Cincinnati, O., 1852; attended public schools there and at Canton, Mo. until he entered Christian University at Canton, 1868; A. B. 1872; A. M. 1907; admitted to bar 1875; public administrator Daviess Co., Mo., 1876-1880; Mayor of Gallatin; representative General Assembly, 1882-1887; speaker of

Mr. Rush stated that several of their witnesses had not yet arrived and asked a continuance. JUDGE GOODMAN granted the motion. He then made a short but pointed address to the crowded room in which he told the audience what was expected of them during their attendance upon the trial; that order would be preserved at all hazard. He said the court was fully able to protect its dignity and the persons of its audience, and therefore any person detected in the court room with weapons on, will surely, swiftly and to the full extent of the law be punished. He further stated that for the accommodation of the populace the trial would be conducted in the opera house, and that to prevent inconvenience and provide for the safety of the audience the sheriff would issue tickets of admission not to exceed the seating capacity of the house.

August, 21.

When court was convened in the opera house, the judge occupied a seat at the front of the stage; behind him were the press correspondents and a large number of ladies and the court officials. Just in front of the stage was a space railed off for the attorneys engaged in the case, the jury and the bar.

Mr. Rush moved the enrollment of R. R. Sloan of the Nashville Bar, who was here as advisory counsel for the prisoner.

Mr. Hamilton. Mr. Sloan has not been examined as to his qualifications for admission to the Missouri Bar. Proof of enrollment in another state is not sufficient.

Judge Philips. While Mr. Rush is technically right in his application, the same end may be reached by according to Mr. Sloan the courtesies of the Bar and Court during the trial.

JUDGE GOODMAN. The gentleman from Tennessee cannot be regularly enrolled without an examination. Therefore Judge Philips' suggestion will be adopted and Mr. Sloan will be granted the privilege of the court.

The following jurors who had been selected were now sworn: Lorenzo W. Gilreath (40), James J. Snyder (35), Oscar Chamberlain (26), Jason Winburn (40), Abisha H. Stillman (38), James B. Smith (27), James W. Boggs (44), Charles H. Nance (38), Ben F. Fendt, William F. Richardson, William L. Merritt (24), Richard E. Hale (23), all farmers.

House, 1887; Judge Seventh Judicial Circuit, 1901-1907; Representative in Congress, Third Missouri District, 1907-1918.

<sup>15</sup> RUSH, WILLIAM MARION. (1849-1914.) Born St. Joseph, Mo., son of a celebrated Methodist preacher of same name and of a daughter of Judge James H. Birch of Supreme Court; studied law in office of Judge Allen Vories and admitted to bar (St. Joseph), 1868; practiced law in Gallatin, Kansas City and St. Joseph; Prosecuting Attorney Daviess Co., two terms; Assistant U. S. District Attorney, 1884-1888; member St. Joseph City Council. Died at St. Louis.

## MR. WALLACE'S OPENING STATEMENT.

*Mr. Wallace.* While criminal practice allows me to make a statement of the magnitude of the crime, and set forth facts that would even augment the heinousness of the crime charged against the defendant, I will not pursue this course, but merely put forth the facts that will corroborate the facts alleged in the indictment. Perhaps this may be a mistaken course on my part. However, I have thought it sufficient to refer only to the irrefutable and overwhelming testimony that will be produced against the defendant. There may be some of the jury who admire the exploits of the accused, his chivalric deeds, his expertness, and other characteristics that have made him famous, and such will regard it as a privilege for such a poor and obscure person as McMillan to be shot down by an individual of such great fame as the accused, but I shall not tax the intelligence of the jury with such a suspicion, nor would it be right to attribute such a sentiment to any other intelligent and law-abiding citizen. A reader of yellow-covered literature might get into a morbid state of mind that would permit such attributes to be attached to the defendant.

*Mr. Wallace* read the indictment, charging Frank James with complicity in the Winston robbery and the murder of McMillan. He then, in turn, described how the train was signaled and stopped; how, in turn, each step of the robbery and the tragedy of Winston was enacted. The particulars were given in detail, every point minutely mentioned, and it was avowed that each in turn would be proved beyond the possibility of a doubt by the prosecution. That was the purpose of the prosecution.

*Mr. Wallace* said that five men were engaged in the double crime. Evidence would be adduced to show that Frank James, Jesse James, Wood Hite, Clarence Hite and Dick Liddil were the parties. Frank and Jesse James and Wood Hite entered the cars, and Dick Liddil and Clarence Hite had charge of the engine. With this assertion it was proper to refer to the James band, its organization and the purpose of

its organization. The band was organized in Tennessee for the purposes of robbery. In 1877, Frank and Jesse James, with their families, moved to northern Tennessee, and subsequently went to living in Nashville. There the band was organized. It consisted of seven, Frank James was the oldest member. Next was Jesse James. Frank went under the name of B. J. Woodson and Jesse as J. D. Howard. Wood Hite, Dick Liddil, Bill Ryan, Jim Cummings and Ed Miller were members of the gang. The three last were not members of the band when the Winston robbery took place.

*Mr. Wallace* gave a history of each individual.

*Judge Philips* objected to the statement as setting forth matters not alleged in the indictment; and evidence on such points would be irrelevant and inadmissible.

The COURT. The question was whether a conspiracy could be proved when not alleged to make out a crime charged. He was ready to hear arguments now.

*Judge Philips*. The question will come up again and then can be argued and disposed of; meantime we file an exception to the court's ruling.

*Mr. Wallace* told how the band came to leave Nashville or that vicinity. Bill Ryan left Nashville, where he went under the name of Tom Hill, to visit the Hites near Adairville. En-route he got drunk, threatened the life of a justice of the peace, was arrested, and the plunder on his person aroused suspicion. News of Ryan's arrest alarmed Frank, alias B. J. Woodson, Jesse James, alias J. D. Howard, and Dick Liddil, alias Smith, and they left.

*Mr. Wallace* followed them on their journey; told how Clarence Hite joined the gang. A box of guns was shipped from Nashville to John Ford at Lexington, Missouri, and thence reshipped to Richmond. John Ford was a brother of Bob and Charlie Ford, and is now dead. The James boys' families left Tennessee just after their husbands, and among their traps was a sewing machine belonging to Mrs. Frank James, which was shipped to Pope City, it being her intention to meet General Shelby.

The gang rendezvous was at Mrs. Samuels' residence near

Kearney and at Mrs. Bolton's in Ray county, she being the sister of the Ford boys.

Dick Liddil would be a witness to these facts. A conspiracy, or such a band could only be discovered or broken up by one of its members. Liddil's surrender under promises of exemption from the consequences of his crimes, has accomplished this.

However, there would be testimony introduced, the testimony of respectable citizens of Daviess county, who had seen Frank in this county about the time of the Winston robbery. He was seen, known and recognized by them, and though he wore burnside whiskers at the time, they would swear to his identity now. All this formed circumstantial evidence, but an unbroken chain strong enough to award the punishment due the defendant for the outrage and crime against law and life at Winston.

#### THE WITNESSES FOR THE STATE.

*John L. Penn.* Resided in Colfax Iowa; with Frank McMillan and several others, I got on the train at Winston; we belonged to the stonemason gang; old man McMillan got on too. It was about 9 p. m. Just as we got on, three men entered the door. Westfall, the conductor, was putting checks in our hats; we were standing up receiving the checks. The three men came in with a revolver in each hand. The two rushed up to our crowd and said something, but just what, I don't know. It was "up, up," or "down, down." Then two shots were fired, one going through Westfall. He made a motion like to defend himself, rushed to the rear end of the smoking car, the three men following and firing. Westfall got out on the platform and fell off. The men then returned to the front end of the car, and as they passed us, or

just as they went out at the front door, Frank McMillan and I went out the rear door. Just then two shots were fired; looked through the glass of the door and a shot shattered the glass; saw a man on the front end of the car; he seemed to be watching and shooting through the car every few minutes. Frank McMillan and I, on the platform, sat down pretty close. Just then he heard a man halloo in the car. At this time three or four shots were fired. The train was going east, and the man was at the front end, and the shot went through the car. Frank heard the man call out, and said, "it is father," and jumped up, and just then he was shot above the eye and fell off the platform. I tried to catch him, but couldn't. The train was going slow at this time. The train slackened up near the switch, and at this time

some man cried out to move on, and the train pulled out slow for three-quarters of a mile, when it stopped. Then three men jumped off the train, like off the baggage car, on the south side, passed me on the platform of the smoking car, went south of the track and disappeared in a hollow. There was shooting in the baggage car; several shots were fired. There were perhaps thirty to forty people in the car during the firing. They got down under the seats as best they could. The man who stood on the front platform shot through the glass of the door; it was shut, as was the back door, and the glass in the back door was pretty badly shattered. After the robbers left, old man McMillan and I went back on the track to look for McMillan and Westfall; found McMillan on the south side of the track in the ditch dead. Before that we met a hand car with twelve men on it; they helped us in our search; found McMillan about half a mile from the depot. Westfall on the north side of the track, not far from the section house.

*Cross-examined.* Do not remember the number of cars on the train. There was a coach after the smoker, a baggage car and express car in front of the smoker; saw three men only; remember nothing by which I could identify the men. They were dressed in long linen dusters, had the collars turned up, and white handkerchiefs about their necks. They were not masked exactly, but masked so they couldn't be identified, by having their hats pulled well down over their faces. I was excited when I was before the coroner; have the facts in mind bet-

ter now than then. When I sat on the rear platform, the three men were in the baggage car, judging from the shooting; no attempt was made to rob me or any one in the car.

Thought the shots were fired to scare, and that when McMillan looked in the shot struck him; shots were fired before and after he was killed; could not say which one of the three men fired the shot that killed McMillan; guess the whole transaction transpired within half an hour.

*Re-examined.* McMillan lived in Colfax, Iowa, had a wife and was on his way home when he was killed; the man who did the shooting through the car was a big man, and the same who killed Westfall.

*Addison E. Walcott.* Was engineer on the train at Winston. The train left at 9:30; it was dark; got a signal to stop shortly after leaving station. Somebody called out to go ahead. Looked around to see who gave the order, and two men jumped down off the coal in the tender. They had revolvers and ordered me to go ahead; they told me to keep it going or they would shoot; to stop at a tank in a hollow. They said they didn't want to hurt me, but would do so if I didn't obey orders; my fireman and me went around the engine, jumped off and got on the third car, and saw the express messenger and two ladies standing up. The rest were under the seats; asked if they had left the train, and the baggageman and I went into the baggage car. The men who came on the engine were dark, good-sized men. It was so dark could not see them plainly; heard five

or six shots in the baggage car; do not remember the size of the train nor what it consisted of. The first stoppage was about two thousand yards from the station and the next two miles didn't know who applied the brake the last time.

We on the engine did not leave it while the firing was going on, and knew nothing of what was going on at the rear of the train.

*Frank Stamper.* Was baggageman on the train. The baggage car and express car were together and next to the engine; the express agent was on the car. When the train stopped I stepped in the side door with my light, and was grabbed by the leg and pulled out, and a man pulled a revolver on me and told me to stand still. The train then moved on, and running I got on it, and passing through the passenger coach and sleeper, the passengers asked me what was the matter, and I said "robbers." The train consisted of a sleeper, three coaches, a smoking car and baggage car. The men came up to the side of the car on the north side, four or five, or six of them. They said "come out." No shots were fired until I got out, then there were shots in the smoking car and in the baggage car. Westfall was the conductor; saw Westfall at the station last; the train stopped the last time two miles from the station, and there the robbers left the train.

Had my light in my hand; saw one of the men distinctly when he came up to the door and pulled me out. The man had a long gray beard, wore a gray vest and white shirt; was the same man that stood guard over

me. The man was a rather tall and slender man. He was not masked. Not any of them were. There was no masking unless they wore false beards.

*Charles M. Murray.* Reside at Davenport, Iowa; was on the train at the Winston robbery, and was express agent of the U. S. Express Co. A short distance from Winston the train was stopped and the baggage master rushed to the door to see what was the matter, and was pulled out; heard some firing; there was some sample trunks there and I dropped behind them. The train moved on and then stopped again. Then a man came in and demanded my money. He asked where the safe was, and I showed him; he demanded the key; I gave it to him, and then he directed me to open the safe; did so and he got the money, or I gave it to him, I don't know which. He asked me repeatedly if that was all. He said they had killed the conductor, were going to kill me and the engineer, and ordered me to get down on my knees. I didn't. He told me again, but I didn't, and he struck me over the head and knocked me unconscious; didn't come to until the baggagemaster came to my relief; didn't know how much money or treasure was taken; as to the packages taken could not tell anything as to their value, nor the number; saw three men (robbers) all told, and two came into the express car.

*Dr. D. M. Cloggett.* Was coroner of Daviess county at the time of the Winston robbery; examined the wound on McMillan's body; he died from the wound inflicted by a pistol or pointed

instrument half an inch above the right eye.

*Dr. Brooks* corroborated the evidence of the preceding witness.

*W. S. Earthman*. Am collector of Davidson county, Tennessee. Nashville is in Davidson county; reside seven miles north of Nashville on Whita's creek; know defendant; saw him first in 1879, and became well acquainted with him at a horse race. Knew him as B. J. Woodson. Woodson resided on Smith's place, and after leaving there didn't know where he went, but saw him about Nash-

ville up to the fall of 1880. Never saw him after that.

Knew Jesse James. Saw him at Frank's place, got acquainted with him at a horse race; was not as well acquainted with Jesse as with Frank. Jesse went by the name of Howard: do not recollect seeing him there later than the fall of 1879; saw Frank and Jesse frequently together; didn't know really who they were; was here last June and saw defendant in courtyard; we spoke. Frank or Woodson asked if I had come up here to hang him.

*Mr. Wallace*. Do you know one Tom Hill?

*Mr. Johnson* objected and *Mr. Wallace* explained that while Hill was not named in the indictment, it was expected to show Hill was Bill Ryan and that his arrest caused the James gang to abandon Nashville, and it would be a link in the circumstances leading up to the Winston robbery.

*Mr. Johnson* argued that the course pursued by the state was incompetent. The indictment charged especially a murder, and the defendant was here to meet that charge and not an irrelevant charge that a band of robbers existed here or there. The existence of such a band in 1880 had nothing to do with the crime at issue. A specific allegation of conspiracy had not been charged in the indictment. Conspiracy was a specific crime, the punishment for which was especially provided for in the statutes. A conspiracy is a substantive offense, the *corpus delicti*, or offense charged must be proved before the circumstances of the consummated offense can be put in proof.

*Mr. Shanklin* replied at length.

The Court confessed that his attention had been called to this question previous to the trial by a disinterested attorney; and he had given it careful consideration. The court thought the testimony admissible.

*Judge Philips* suggested that the testimony being offered should be carefully considered. It was doubtful in his mind that a conspiracy would be proved, but the state should be forced to produce its proof of the existence of a conspiracy before the introduction of evidence tending to affect the character of the defendant, or tending to show that he associated with men bearing a multiplicity of names.

*Mr. Earthman*. Knew a man after his arrest was known as by the name of Tom Hill, who Bill Ryan.



*Mr. Johnson.* I object.

The COURT. It appears this testimony at this time is incompetent until the connection of Bill Ryan or Tom Hill with the Woodson or James gang is established.

*Mr. Wallace* explained that the James gang robbed the Winston train, and that this James gang lived at Nashville, and that when Ryan was arrested they abandoned their field of operations about Nashville and came to Missouri, and he would trace them from Nashville, through Kentucky into Missouri, and into Daviess county.

*Mr. Johnson* objected to his client being called a robber. He was innocent until proven guilty. The theory of justice was against such an appellation. Moreover the court was not trying the James gang, or any band of conspirators.

The COURT said this was not the time for flights of rhetoric. He could understand a plain statement better.

*Mr. Wallace* declared he was authorized to speak of the accused as a robber and murderer, for the indictment so charged.

*Mr. Earthman.* Bill Ryan when arrested was armed and had \$1.400 on his person. Ryan was afterward taken to the Nashville jail. This arrest was made on the 25th of March, 1881; did not know Dick Liddil. Ryan rode a gray horse to the place where he was arrested.

*Cross-examined.* Had known defendant for about two years. He was working on my farm. Woodson worked for me during one summer, and was constantly at work. Woodson associated with good people and never saw him with Bill Ryan or Hill.

*James Moffat.* Have lived at Nashville ever since the war; am depot master of the Louisville and Nashville Railroad; knew B. J. Woodson at Nashville during the year 1880; saw him frequently during that summer and fall; remember Bill Ryan's arrest; don't think I ever saw Woodson there after that, but saw him just before; knew J. B. Howard; he lived a square and a half from me; he had a wife and one child; think Howard was buying grain for Rhea & Sons; never

saw Howard and Woodson together but once; it was a few days after March 30, 1881, that I saw Woodson and a Mr. Fisher on Cedar street, talking; never saw Howard there after the arrest of Bill Ryan. The man on trial before me is the B. J. Woodson that I knew.

*John Trimble.* Live at Nashville, Tennessee; have been in the real estate and fire insurance business for ten years past; rented the house 814 Fatherland street, in Edgefield, in the first part of 1881 to a man named J. B. Woodson; have not recognized the man since I have been here; he paid me \$8 per month in advance; we never received any notice that Woodson was going to quit the house.

*Jas. B. May.* Am a pressman, and live in Nashville, Tennessee; bought a house from Mr. Trimble March 22, 1881 on Fatherland street, No. 814. Did not move into it till April, and then there was no one in it; never received any notice that the parties were going to leave; went over to see if they wished to con-

tinue renting it, and found they had gone.

*Mrs. Sarah E. Hite.* Live near Hendersonville, Tenn., with my father, Silas Norris, thirteen miles from Nashville. I lived near Adairsville, about fifty miles north from Nashville. My husband had children when I married him; know Wood Hite. He lived with us part of the time. There were seven children—four boys, named John, George, Wood and Clarence. We lived some two miles from town. Wood Hite was 33 years old. He died near Richmond, Missouri, I was told; think he was buried there. He was about five feet eight inches high, had dark hair and light blue eyes, light mustache, Roman nose, narrow shoulders, a little stooped, inclined to be quick in his actions; last saw him in November, 1881; said he was going West; first time I saw prisoner was March 20, 1881; he came to my husband's house that morning. Dick Liddil came with him and Jesse James came after him. Frank was riding. Jesse and Dick were walking. Jesse had two pistols and a rifle. Frank had two pistols, and Dick had two pistols and a gun; stayed at our house a day or two. Clarence and Wood and George Hite were there, too. Saw them after that on 26th April. That day Dick, Jesse, Frank and Wood came back. They were still armed. Some men pursuing

them came near the house. Jesse and Frank were excited at this, and commenced preparing themselves. Dick got at the front door, Jesse at the window, and Frank was in the parlor. The men rode on by. Frank James left on the 27th. Clarence Hite was 21 years old, tall and slender, blue eyes, light hair, large mouth, and one or two teeth out. He is dead. He died in Adairsville last March. He was in Missouri in the summer of 1881. Wood Hite left home May 27, 1881. He and Clarence left a few days apart. Mr. Hite's first wife was Frank James' aunt.

*Silas Norris.* Live at Mechanicsville, Sumner County Tenn., adjoining Davidson county. In the summer of 1881 was living in Logan county, Ky. Adairsville is in that county; knew Jesse James; first got acquainted with him in March, 1881, at Mrs. Hite's; know Frank James; was introduced to me by Jesse as his brother; Mr. Liddil was there also; don't know where they came from. They stayed a short time and left. They came back, stayed a day or two and went off for perhaps a week. Wood and Clarence Hite were away a portion of the summer.

*Cross-examined.* Old man Hite is probably 65 or 66 years old. He is still living.

*August 25.*

*James A. Liddil (sworn).*

*Judge Philips.* We object to his testimony as incompetent, he being an unpardoned felon. Dick or James A. Liddil has served a term in the penitentiary for horse stealing, having been sentenced from Vernon county in November, 1877.

*Mr. Wallace* admitted it, and submitted a copy of a pardon for him, which the state argued established his reliability as a competent witness.

The pardon was as follows:

The State of Missouri, to all whom these presents shall come:

Greeting—Know ye that by virtue of authority in me vested by law, and upon recommendation of the inspectors of the penitentiary, I, Henry C. Brockmeyer, lieutenant acting governor of the State of Missouri, do hereby release, discharge and forever set free James A. Liddil, who was, at the November term, A. D. 1877, by a judgment of the circuit court of Vernon county, sentenced to imprisonment in the penitentiary of this state for the term of three and one-half years, for the offense of grand larceny, and do hereby entitle the said James A. Liddil to all the privileges and immunities which by law attach and result from the operation of these presents. Conditional, however, that the said James A. Liddil, immediately upon his release, leave the county of Cole and never return thereto voluntarily, and does not remain in the county of Callaway.

Witness June 30, 1877, etc.

*Mr. Glover.* Under the statutes of the state every person who shall be convicted of arson, burglary, robbery or larceny in any degree in this chapter specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of the chapter, shall be incompetent to be sworn as a witness or serve as a juror in any case, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit within the state. 1 Wagner's Missouri Statutes, 1872, page 465.

Section 1671, Revised Statutes, 1879, as to pardon, says: When any person shall be sentenced upon a conviction for any offense, and is thereby, according to the provisions of this law, disqualified to be sworn as a witness or juror in any cause, or to vote at any election, or to hold any office of honor or profit or trust within this state, such disabilities may be removed by a pardon by the governor, and not otherwise.

By Article 5, Section 8, of the Constitution of Missouri, the power to pardon is lodged in the governor.

Under the above section and article of the constitution the governor can remit any part of the punishment. *Perkins v. Stephens*, 24 Pick. 277; *State v. Foley*, 15 Ver. 64. This paper is not a pardon. It shows on its face it is a mere commutation under three-fourths rule of section 21, page No. 989, Revised Statutes of Missouri, 1872. Which section has been supplanted in Revised Statutes, 1879, by section 6533, page 1283. It is therefore merely a commutation under this rule. An identical instrument with this is held not to restore competency in these cases. *Black v. Rogers*, 49 Cal. 15; *People v. Bowen*, 43 Cal. 439; *State v. Foley*, 15 Nev. 64; *Perkins v. Stephens*, 24 Pick. 277.

Liddil having been convicted, the infamy having attached, the same can only be removed by a pardon, and could not by an act of the legislature, because the disability is a part of the punishment.

Evans v. State, 63 Tenn. 13; State v. Foley, 15 Nev. 64; Long v. State, 10 Tex. App. 197; Houghtaling v. Kelderhouse, 1 Parker's c. c. 241.

No part of punishment can be remitted by the legislature, as this would be exercising the pardoning power, which in Missouri is lodged in the governor alone. State v. Sloss, 25 Missouri 291. Hence the dropping of the disqualification to testify from the Revised Statutes of 1879, section 1378 cannot operate to restore this witness to competency. Section 1671, above cited, says the competency can be restored by a pardon alone.

Mr. Shanklin maintained that the executive of the state, under the constitution, was empowered to commute a prisoner's sentence, pardon him or conditionally pardon him. There was no partial pardon provided for. It was plain that the paper in issue was not a commutation. It was, therefore, a pardon—the governor being empowered to do only the two things, commute or pardon.

The JUDGE said that he had carefully examined the question as presented by counsel, and in his opinion none of them had presented the case so strongly that it warranted him in excluding the testimony. The word pardon was not necessarily a part or parcel of the pardon. No special form was required, and words implying the same thing as pardon were all that was necessary. In regard to the paper at issue, it was neither a reprieve, commutation nor the remission of a sentence. The governor intended to do something, and that something in this instance the court believed was the granting of a pardon. The face of it proved that, as it distinctly set forth, that the bearer went free, etc. While the pardon was in effect granted, it did not dispose of the preliminary proof, or proof to show that the pardon in question was a correct and official instrument.

The question then arose as to the competency of the witness to prove or testify to the fact that the pardon was genuine, or that the transcript in court was a correct one of the pardon granted.

Mr. Glover and Mr. Philips argued against it, holding that the witness, so far as his status was established before the court, was only competent to testify to material facts in the case on trial, and not to his own competency or any instrument making him competent.

Mr. Wallace held that he had been adjudged a competent witness by the court, and as such could testify as to all facts regarding himself or the matter at issue. He cited authority to show that the testimony of the witness regarding his own pardon was sufficient in law without an exhibit of any instrument to that effect.

The COURT held Liddil competent, and instanced the case of a witness under age who was questioned as to his competency.

Liddil. I was sent to the penitentiary for grand larceny in 1874 from Vernon county, and had been pardoned; never was in the penitentiary but that time; had torn up the pardon.

Cross-examined. Was given the pardon by an officer of the

penitentiary; never looked at it and did not know its purport.

*Mr. Philips* submitted that no pardon was in proof. The witness did not know what the paper was; he was merely handed a paper, and that was all.

*Liddil.* Cannot remember who gave it to me; thought it was a deputy warden; it was handed me in the warden's office; was told my time was out and the papers was my pardon; never read it or knew its contents; tore the pardon up because it was of no use, and never showed it to anyone; tore it up about ten minutes after I got it, and while on the way to the depot to take the train.

The COURT held the proof was sufficient.

*Dick Liddil.* Am 31 years old; born and raised in Jackson county; know Frank and Jesse James. First got acquainted with them in 1870, at Robert Hudspeth's, in Jackson county, eight miles from Independence. The Hudspeths are farmers; was working for them, first for Robert Hudspeth; saw the James brothers there a dozen times or more from 1870 to 1875, together sometimes and sometimes separate; saw Frank and Jesse James, Cole and John Younger and Tom McDaniel. I have seen two or three of them there together—namely, Jesse James, John Younger and James McDaniel; never saw all five together; they were generally armed and on horseback; they would stay around there maybe a day and a night, or two nights, or maybe not more than two hours; supposed from what I heard and saw that they went together in a band.

There was a gang known as

the James boys; belonged to it at one time; joined four years ago this fall, in the latter part of September at Hudspeth's; saw Jesse James at Ben Morrow's one day; Ben lives in Fort Osage Township; didn't go with him at once; did afterward. The band was Jesse James, Ed. Miller, Bill Ryan, Tucker Basham and Wood Hite. That was in the fall of 1880, in Jackson county. From there we went to six miles from Independence. I left shortly after that. The others left—that is, part went and part remained. Jesse James and Miller told me they went to Tennessee. I went in the summer of 1880 to Nashville with Jesse James. There we found Frank and Jesse James and their families; remained in Nashville nearly a year. The others came there in the winter of 1880—that is, Bill Ryan and Jim Cummings. Bill Ryan was from Jackson county. Bill Ryan, myself and Jesse James went there together. That was my second trip. Ed. Miller was not there while I was there. Ryan and Miller stayed with Jesse. Cummings stayed with Frank awhile. Afterward they boarded with a lady named Kent; last saw Ryan in the last of February, 1881, about three weeks before I left Nashville. He got up and left very mysteriously; have never seen him since. Jesse James lived for a while with Frank on the High Ferry Pike. Then he boarded with Mrs. Kent, and then moved to Edgefield. He moved from there over with Frank on Fatherland street some time in February, 1881. Frank moved from there the first of January or the first of February, into a brown frame of one story,

with four rooms and a porch. The house was No. 814; was rented from Lindsay. While Frank was living there, there were with him Jesse James, Jim Cummings and Bill Ryan. Frank and Jesse and I left March 26, 1881. Bill Ryan had been captured, and we took a scare and lit out; had seen Bill the day he was captured. He was going to Logan county, Kentucky, to old man Hite's; first learned about his capture when I got a paper on Saturday describing Ryan's capture on Friday. We got ready and left about dark.

We left on horseback. Frank had a horse of his own. Jesse and I captured a couple. We were twenty miles when those two horses gave out, and we got a couple more. We went to old man Hite's. We were armed. I had two pistols. Jesse and Frank had a Winchester rifle apiece. It was forty miles from Nashville to Mr. Hite's. We got there at sun-up. Found Mr. Hite, wife and daughter; Mr. Norris, wife and girl, and Wood Hite; stayed there a week; some officers from Tennessee came after us; went from there to Mr. Hite's nephew's, three miles off—Frank, and Jesse, and Wood Hite and myself. We stayed there a week and went back to the old man's. We were all armed. We remained there only one night, leaving on Sunday night for Nelson county, Kentucky, one hundred and fifty miles off. Frank and Jesse and I went up there on horseback. There was no one I knew when I got there. We stopped at Johnny Pence's, Bud Hall's and Doc Hoskins'. An arrangement was there entered into for robbery by myself, Frank

and Jesse James, and Clarence Hite. Wood Hite came afterward. We first agreed to take the express where the train crossed the river. The river was high, and they had to transfer by boat. The river went down, and we got there too late, and we arranged to take a train here somewhere. This was talked over at Bob Hall's. Wood Hite was there at his father's. This was the latter part of April or first of May, 1881. Jesse's family at Nashville was a wife and one child. Frank's consisted of a wife and two children, living at Fatherland street. Jesse's wife came to Nelson county shortly after we got there.

From there she said she was going to Missouri; never saw her after that till Jesse was killed. Jesse told me she came to Kansas City. He told me he was renting a house in Kansas City. He told me this in the fall of 1881; don't know about Frank's wife except that Jesse told me she came out on the train to Gen. Joe Shelby's at Saline. She brought a sewing machine with her and gave it to her mother. It was shipped to Gen. Shelby's; so Jesse told me. Jesse made some kick about Frank's wife coming here, and Frank told me that it was all right, and that he told her to come and give the machine to her mother. He objected because he said she told some things she ought not to. Her mother was Mrs. Ralston, and she lived some six miles from Independence. At Nashville Frank James went by the name of B. J. Woodson, Jesse was J. D. Howard, Ryan was Tom Hill, and I was Smith, from Nelson county. Frank and Jesse shipped

two guns by Johnny Pence to John T. Ford, at Lexington; a Winchester rifle and a breech-loading shot gun. 'Jesse and I came here together on the cars to Kearney in May, 1881. We went from there to Mrs. Samuel's. Frank came out a week later. Mrs. Samuels is mother to Frank and Jesse James. She lived four miles from Kearney; had been to her house before. Wood Hite came afterward. We found Clarence Hite here, he having come out with Jesse's wife to Kansas City, and then came to Mrs. Samuels'.

Wood Hite was not at Hall's when the plan for the robbery was made. The others left word where they would meet him. Clarence Hite was 20 years old. Wood was 33 or 34 years of age. When in Missouri don't think he wore whiskers. If he did they were thin and light. His name in the gang in Missouri I could not give. We had to change names many times. I was Joe. Frank was Ben in Tennessee and Buck here, and Jesse was Dave in Tennessee. From Mrs. Samuels' went on the cars to Clay county, and went back on the cars. My horse I bought of Hudspeth. He was a chestnut bay, with several distinguishing marks. At Mrs. Samuels' I found Frank James and Wood and Clarence Hite. Jesse came along afterward. Jesse had bought a horse from his half-brother, Johnny Samuels. We started out in pursuance of an agreement about a week after. We four started on horseback—Frank, Jesse, Wood and myself. Clarence went on the cars to Chillicothe. I rode the sorrel, Jesse rode a bay, and Frank and Wood Hite rode horses that

Wood Hite and I took from a rack in Liberty. From Mrs. Samuels' we started to Ford's, in Ray county, and got there about three o'clock in the morning, and left there the next morning. The Widow Bolton, sister of Charley Ford, lived there—a mile and a half southeast from Richmond. From there we went to Chillicothe, at a moderate gait all day. We got dinner on the way. At night we four stayed at a church on the prairie. We got to Chillicothe about ten, stopping a mile and a half from town in the timber. Wood Hite went in after Clarence, and found him, and Clarence came out with him. The roads were so muddy that we went back, Jesse and myself to the old lady, Wood and Frank to the Fords', and Clarence to Mrs. Samuels' also. We stayed there three or four days.

Shortly after this we started out again. Four went horseback; Wood going on the train. Frank was riding a roan pony. He took her at Richmond, and Wood Hite had a little bay mare, taken at the same time. Jesse and I had the horses we rode on the previous trip. The horses gotten at Liberty were turned loose at Richmond. We started that night and camped out before daylight somewhere in the woods. We were to meet Wood Hite at Gallatin. We stopped and had dinner with a Dutchman in a one-story frame close to the road, with a large barn one hundred yards from it. He had a family of five or six children. He had a number of fine cows, and sold milk at Kidder; left my leggings there and had to go back after them; reckon this place was ten or fifteen miles from Gallatin.

At that time I had short whiskers all over my face. Jesse was five feet eleven inches and a half high, round face, pug nose, dark sandy whiskers and blue eyes. He weighed 195 pounds and stood very straight. Frank James had burnsidies and mustache. His whiskers were darker than his mustache. From that German's we went to Gallatin, first stopping in the timber to wait for Wood Hite, a mile from the town, on the road to Winston.

Met Wood there. Jesse got sick with toothache, and the creosote he used swelled his jaw and his face and he had to go back. Clarence went on foot and Frank, Jesse, Wood and myself went on and stopped with a man named Wolfenberger, some sixteen miles from there; helped him load up a load of wood next morning; had supper and breakfast there, and left next day. Clarence stayed somewhere else. Jesse was very sick and we had to wait on him. We started for Mrs. Samuels' and Jesse was so sick we had to stop at an old stockman's. Wood Hite took the train to the old lady's and Clarence stayed with us. Jesse got the stockman to take him in a buggy to Hamilton depot. The others then started for Mrs. Samuels', but Frank and I went to Mrs. Bolton's in Ray county. There was a week or ten days between the first and second trip. Frank and I stayed at Mrs. Bolton's a week, and then met Jesse, Clarence, and Wood at Mrs. Samuels'. In about a week or ten days we went on another trip; rode the same horse as before; so did Jesse. Frank was riding a mare he got close to Elkhorn. We had a sorrel horse

shod on the first trip by an old man. I remember a dog and stool there. The dog jumped upon and knocked down the stool, and the horse started, knocking over the blacksmith, and I had to bring the horse back to the shop. We had some difficulty in making change. On the last trip we all had horses. Frank rode the bay mare from Elkhorn. Wood rode a dark bay, taken by Frank and I from old man Frazier in Elkhorn. Frank rode the sorrel I had started on.

We started at night. I assisted in robbing the Winston train on this trip. We started from Mr. Samuels' at dark, coming northeast to Gallatin. We rode till daylight, when we came into a skirt of timber, where we stayed all night till sunrise. I don't reckon we came over fifteen miles that night. Next day we scattered. Frank and Clarence went together, and I, Jesse and Wood Hite together. We three ate dinner at a white house on the road, with an old shed stable back of it. There we met Frank and Clarence late in the evening. That night we stayed in the timber where we next met Wood on the former trip. We left Frank and Clarence together, Jesse and Wood together and I by myself, all going different routes; got my horse shod in Gallatin on the last trip we were here; can pick out the shop; is an old frame shop. There is another shop right below. I also got a pair of fenders to keep my horse from interfering. The saddler who sold them was a heavy man, with a dark mustache and a dark complexion. We were to meet about a mile from Winston. Got dinner on the way, and went on to



meet the boys in a skirt of timber near where the road crosses the track. We waited till dark, hitched our horses and went up on foot to the train. Wood and I went together, and met Frank, Jesse and Clarence at the depot.

The arrangement was as follows: I and Clarence should capture the engineer, fireman and engine and start it or stop it as we might be directed by Jesse and Frank. Jesse, Frank and Wood were to get into the passenger cars and at the proper time rob the express car. We carried out the program when the north bound C., R. I. & P. passenger train came along. After getting outside of town Clarence and I got up back of the tender, and went over on top to the engine. We had two pistols. We kept quiet till the train stopped; then we hollered to go ahead. We shot to scare those fellows, who both ran onto the pilot. The first run was about two hundred yards, then a stop. About this time one of the boys pulled the bell rope and the engineer stopped the train and firing back in the cars commenced. Don't know how many shots. Jesse got into express car through the rear door and Wood and Frank tried to get in through the side door. The baggageman was standing in this side door and Frank seized him by the leg and jerked him out of the car and left him on the ground. Frank, dived into the express car and he or Jesse hollered to us to go ahead. The engineer pretended he could not move the train as the brakes were down. We then struck him with a piece of coal and told him we would kill him if he did not start the train. He

then threw open the throttle and started it under a full head of steam. The engineer and fireman then got out of the cab and hid in front of the engine. We, firing a number of shots to frighten them, did not aim to hit them, as we could have easily killed them, being most of the time within a few feet. Started back to the express car, but Clarence called to me and I returned to the engine. Frank came out and shut off steam, and as she slacked we jumped off while it was running. Frank and Clarence got off first. I went back after Jesse who was still in the express car. Jesse jumped first, and I followed. We got \$700 or \$800 that night in packages. We all got together, except Wood, who had been knocked down as Frank pulled the baggage-man out of the car, and we never saw him. Frank talked to me about the robbery afterward. He said he thought they had killed two men. Jesse said he shot one, he knew, and that Frank killed one. He saw him peep in at the window, and thought he killed him. From there we went to our horses, taking our time. The money was divided in a pasture, just before daylight. Jesse divided, giving us about \$130 apiece, before we got to Crooked River. Wood and I then went to Ford's, the others went toward their mother's. Stayed at Ford's about a week, and then went to Mrs. Samuel's, but found no one but the family there. Jesse and Frank came to the Ford's a week later, and then all five of us went to Mrs. Samuel's. All the horses had been previously turned loose.

We went to Kansas City, cross-

ing on the bridge. Jesse and Charley Ford got out at Independence. Frank and Wood Hite went to Doc Reed's, about four miles from Ralston. Clarence and I went to McCraw's, fifteen miles east of Independence. Three or four weeks after I saw Frank James in Ray county, in September or October. He was at Widow Bolton's. He came there one night and left the next night for Kentucky with Charley Ford and Clarence Hite. They went to Richmond, missed a train and took a buggy to the R. and L. Junction and went to Kentucky. Have never seen him since. We were all armed with pistols at Winston. Had on a plaid suit; Frank had a bluish suit, all alike. Don't remember Jesse's suit. He had a dark striped coat and pants, and a big duster. Clarence had a dark suit, all alike. Wood had pants and coat of different cloth. Saw the guns that were shipped, at Mrs. Samuel's. Frank and Jesse had them. We didn't have them at Winston. The robbery was in 1881, in July. Either Frank or Jesse designated the meeting place at Gallatin, because no one else knew anything about the country.

To *Judge Philips*. Went back to Jefferson City with Sheriff Timberlake in 1882, in January or February. Was there shortly after that with Mr. Craig, of Kansas City. Saw Governor Crit-

tenden both times, first at the depot and the other time at his office. Don't remember telling the Governor that after the Winston robbery Frank James upbraided Jesse for killing any one, or reminded him of the agreement before the robbery that no one should be hurt or killed.

*Governor Thos. T. Crittenden* was, by consent of counsel, examined out of time, in order to save him the trouble of staying here till his name could be reached in the usual order, and testified in behalf of the defense as follows:

To *Judge Philips*: Liddil did make such a statement to me as propounded just now. Think it was the second time he was at Jefferson City. It grew out of asking him why he killed an innocent man engaged in his duties. He said that it was not the intention to do it; that the understanding was there was to be no killing; that Frank had said there was to be no blood shed, and that after it was over Frank said, Jesse, why did you shoot that man? I thought the understanding was that no one was to be killed, and I would not have gone into it if I had known or thought there was to be anything of that sort done. To which Jesse said, By G—d, I thought the boys were pulling from me, and I wanted to make them a common band of murderers to hold them up to me.

*August, 28.*

*Liddil*. When I left Jackson county I went to Vernon county somewhere in 1875 or 1876 and worked for my father, and some other parties also. Was convicted there of horse stealing.

Don't remember at this time the date of the trial. The party with me on trial was named Frakes. Was in the penitentiary for that offense thirty-one and a half months. Went

to Hudspeth's in Jackson county. First saw Jesse James at Ben Morrow's in 1879. Also saw Ed. Miller and Wood Hite. Think in the latter part of September, 1879. Saw Bill Ryan and Tucker Basham at other places. Frank James was not there at that time. Up to 1879 had not met Frank James. Joined the gang in 1879. We scattered out at this time. Went to Ft. Scott and stayed there about three months. We had been in some trouble and thought it best to scatter. Refuse to say whether I was engaged in the Glendale robbery.

From Ft. Scott went to Carthage; then came up to Six Miles, and went to Mrs. Samuels', and from there, in July, to Tennessee. Jesse James and Bill Ryan went with me to Tennessee. On this trip did not see Joe Shelby or stop at his place. Never saw Shelby but once in my life, and that was in November, 1880. I was at his house then one evening and came back next morning again. Crossed the Mississippi at Cape Girardeau, went to old man Hite's in Logan county, Kentucky, and went to Tennessee to Frank James'. From 1874 didn't see Frank till I saw him in Tennessee at his place, three miles from Nashville, on the High Ferry Pike. From Frank's we went back to old man Hite's, and then I went back to Frank James' place in August, and stayed four or six weeks. From there we went to Atlanta. Next returned to Missouri, about the first of November, 1880. Jesse James only came with me. Bill Ryan had come out in September previous. Bill Ryan, Jim Cummings, Jesse James and myself were the party that went back

to Tennessee. Jim Cummings was five feet eleven inches high, very slender, with sandy hair and whiskers and blue eyes. He was about forty or forty-five years old. First met Jim Cummings on the first of November, 1880, at Ford's near Richmond, in Ray County. On this trip south we saw Gen. Joe Shelby at his house. Went to Nashville, part of the way on horseback and partly by rail. I got there first and the others arrived two weeks later. Frank James was still living at his place until the last of January, 1881, when he moved into Edgefield. Had not seen Ryan for three weeks before his arrest, and have not seen him since. He was arrested for a breach of the peace, in which he drew a pistol, and was put into Nashville jail. We left as soon as we heard of Ryan's arrest. Left March 26, and went to old man Hite's on the morning of the twenty-seventh. We borrowed the horses on which we made this trip. We didn't ask their owner's permission to use them, they being asleep. Clarence Hite was the first one to tell us about the officers from Tennessee being on our tracks. Mr. Norris told us about seeing a posse of men fixing to go out somewhere. That same day (Sunday) we saw three men coming riding by the house. We thought they were coming after us, and Jesse and Frank and myself fixed ourselves. Frank went and fixed himself a place in the parlor by the window. I was in the hall behind the door, and Jesse on the opposite side of the hall near the door.

Decline to answer about any expeditions in 1879 on the ground that I do not desire to

commit myself. Decline to answer who went with me. Defendant was not with me. From Hite's, in 1881, we went to Logan county, Kentucky, where I stopped first at old Dr. Haskin's and afterward at Bob Hall's, and then started to Missouri. At Bob Hall's we made the arrangement about coming to Missouri. We went to bid Johnny Pence goodbye. By we I mean Frank James, Jesse James and myself. We went on horseback from Hall's to Louisville. Decline to answer where I got my horse. Jesse James went with me to Louisville, and I came to Missouri with Jesse James. The arrangement was that we were to come out here to rob the express where it crossed the river at Kansas City, the river being high so that trains could not cross. There was no other definite object right at that time. From Mrs. Samuels, on the last of May or first of June, we learned that the river had fallen, and this project was abandoned. The Chillicothe trip was in June and only took four or five days.

I and Clarence Hite were on the engine all the time except the time I went back over the coal to see if the brakes were on, and the time I went into the express car after Jesse James, after the thing was ended. The baggage or express car had solid doors. Jesse came out of the forward door when the train stopped and they all got off, and Frank came through the same door when I came over the tender to shut off steam. Heard firing back in the rear cars while on the tender to the number of six or seven shots. Did not fire a shot until after the engineer

and fireman had run out on the pilot, when me and Clarence Hite fired two or three times each to bring them back. Did not hear any shooting at all after Frank James came over the tender. The shooting I heard was just after we started and before the first halt.

After the robbery, me and Wood Hite went to the Ford's, getting there the Saturday night following the Friday of the robbery, where we were joined by Jesse and Frank James and Clarence Hite. Was at Nichols' house right after this, with the other four. Got there at midnight, and only stayed a few minutes to eat all the cold grub they had. Nichols and his wife were present. Don't think we were in the house, we sat around the platform of the well. Was also at Joe Hall's. Jesse and I stopped there one night to get some buttermilk.

Deny telling Joe B. Chiles, at Kansas City, that Frank James was not at the Winston robbery, but had a conversation with Chiles, in which Chiles said he had a pass from Governor Crittenden, and that he had been riding around on it, but that he had never looked for the James boys; never had tried to find them, and did not want to. About the time of my arrest in Kansas City, might have told Major McGee that I was not at Winston.

Deny in toto telling Frank Tutt, coal oil inspector at Lexington, on the same occasion, that I didn't know where Frank James was, and that I had not been with the party for years, on account of Jesse and Frank having had trouble. Deny hav-

ing heard Jesse James on another occasion tell John Samuels (Frank James' half brother) that Frank was in Tennessee or Kentucky, and had gone south on account of his health, heard them asking for Frank, and that Jesse said he would be at Mrs. Samuels' in a few days. Decline to tell when or where I last saw Wood Hite, or when I first heard of his death, or to answer whether Wood Hite was dead or not. Was in Ray county when I first heard of it. Remember Mrs. Bolton's house being raided in January, 1882, and crept out that night through a door. Had been negotiating for a surrender with Governor Crittenden through Mrs. Bolton, who had brought me word to surrender to Sheriff Timberlake, the condition being that I was not to be prosecuted, but was to give evidence and assist in the capture of the James brothers.

Had been in jail in Alabama for eight months, but had been released to come to Kansas City, and there bailed by Messrs. Craig and Timberlake to come to Galatin. Have since been out West in Kansas and the Indian Territory; Mr. Wallace and Mr. Craig and those gentlemen paid my ex-

penses; got back to Kansas two weeks last Friday. At Kansas City I boarded at the court house in care of a deputy marshal. Had passes to travel on the railroads. Mr. Longhorne has charge of me. He has served a writ on me two weeks ago. Have not been put in jail under it, and have not given any bond. Paid my own way from Alabama, Bob and Charley Ford having sent me \$100 when I was there. Came the rest of the way on my carpet-sack and pistols. Redeemed my carpet-sack and pistols. Have not been engaged in any business since my return from Alabama.

To Mr. Wallace: At Winston we all had two pistols except Wood Hite who had but one. And leaving the train we all loaded up, Frank and Jesse, Clarence and Wood and myself. Defendant loaded up and said he had fired several shots, he and Jesse both.

Jesse never had a horse after the Winston robbery. Never was with him when he was on horseback after that. At the time of the Winston robbery, defendant wore long burnside whiskers and a mustache.

August, 28.

*William Earhman*, (recalled): At Nashville Frank James wore whiskers long all over his face, the whiskers being a little darker than his hair. Arrested Bill Ryan, not because he was drunk and carried a pistol, but because he said he was a robber and an outlaw against the state and country.

*J. Thomas Ford*. Live in Ray county; am father of Bob and

Charley Ford. In 1881 Mrs. Bolton, my daughter, lived half a mile east of Richmond. Heard of the Winston robbery. Saw defendant a short time before that, between the first and tenth of July. Ate dinner with him at my sister's. He went by the name of Hall.

*Cross-examined*. Have seen Jesse James two or three times. First in 1879 or 1880, when he

came to my house. Know Dick Liddil. He first passed my house once with Jesse James in 1879 or 1880, when they stopped and got their supper. Afterward saw Wood Hite under similar circumstances in the fall of 1879 or 1880. Never knew Clarence Hite. Had often seen Jim Cummings in Clay and Ray counties. Remember also seeing Wood Hite and Jesse James at my place in September, 1881. Know James C. Mason, a neighbor. Never told him shortly after Jesse James was killed that Frank was not in the Winston or Blue Cut robbery, or that he had not been in the county for a long time, or that I never knew anything about their being at my son's house. Never made any such statement to Wm. D. Rice either.

When I saw him the defendant wore side-burn whiskers and a mustache. Frank James said either he hadn't seen his mother for five years, or was trying to see her, or hadn't been in the county for five years. Haven't talked with Liddil since the winter of 1882. He was at my house twice since his surrender. Last time I ever saw Wood Hite he was in company with Dick Liddil, in July or August, 1881. Heard he was killed at the house where the boys were farming.

*Elias Ford.* Know the defendant. First saw him about first May, 1881, at Charley Ford's. There were present Frank and Jesse James. Can't say about Liddil or Wood Hite being present or not. He went by the name of Hall. Jesse introduced him under that name. First saw Jesse in September, 1879, at my father's, with Ed.

Miller. I have seen Frank James often since. In June and July; about the first of July, 1881, with Jesse, Dick Liddil, Clarence Hite and Wood Hite. Saw him next again about August 1. The same party were there then. They were riding. Frank was there a week or ten days. He had side whiskers and a mustache. Have a brother, J. T. Ford. Know of a box shipped to him at Richmond. It had a couple of guns in it. A double barreled shot-gun and a Winchester. Jesse took the rifle off. Don't know who took the shot-gun. Know Jim Cummings. Got acquainted with him in 1871 or 1872; last saw him in the fall of 1881 at Charley Ford's house. Know him well.

*Mr. Glover.* Did you not help to bury the body of Wood Hite in the brush near the Woods pasture in Ray county?

*Mr. Wallace* objected, and the COURT sustained the objection.

*Mr. Glover.* Did not Dick Liddil kill Wood Hite? The COURT ruled the question inadmissible also, that witness need not answer a question as to whether he did not keep concealed the body of Wood Hite all day till it could be buried.

The *Defendant's counsel* gave as their reason for putting the question that they desired to show that Liddil had killed Wood Hite, and then gone and given himself up, and given away the rest of the gang to secure immunity for that crime.

The COURT adhered to its previous ruling, that the questions asked were improper, and that a witness' conduct could not be shown by proof of special bad or immoral acts. Liddil's credibil-

ity might be attacked, but not in that manner.

*Mrs. Martha Bolton:* Live at Richmond, Missouri. Am daughter of Thos. Ford, and a sister of Bob and Charley Ford. Know Frank James. First saw him at my brother's in May, 1881. He came there one night with Jesse James. First saw Jesse James in 1879 at my father's. Ed Miller was with him. At the May, 1881, visit Jesse stayed all night and Frank stayed a week, reading Shakespeare and othere books in his room. Saw Dick Liddil, Wood Hite, and Clarence Hite there. They all went away together with Frank James. At that time Frank wore side whiskers and mustache, and went by the name of Hall. Saw him again two or three weeks after, in company with Dick Liddil. They went away together. He was gone two or three weeks, and came back again and stayed till before the Winston robbery. After that saw him and Jesse and Clarence Hite come there about the last of July. Wood Hite and Liddil were there already. Time they remained, two days, and left together. Next saw Frank James about the first of October. He came with Charley Ford and Clarence Hite. Dick Liddil was already there. They all left my house together for Richmond. Never saw Frank James or Clarence Hite after that. Know Jim Cummings. He was once at my house in Richmond; that was in 1879, I believe. Did not see him the summer that I have described seeing the other men I have named. Have heard that Jim Cummings was there in the spring of 1881. Never heard of

his being there in the summer or fall of 1881.

*Cross-examined:* Liddil was in the house January 6, 1882, at the time of the raid, when he escaped, I didn't ask him how. Wood Hite is dead. He died December 5, 1881. He died about one hour before sunrise that morning. (The question of how Wood Hite came to his death, or what was done with his body, or where he was buried, were all ruled out by the COURT.

The raid on my house was made about the sixth of January following the fifth of December on which Hite died. Liddil gave himself up the twentieth of January, 1882. Went to Jefferson City to make arrangements for the surrender of Dick Liddil. Dick surrendered on condition of immunity from punishment, and that he would testify against the rest of the band. Know James C. Mason. Never told him that Wood and Clarence Hite, Jesse James, Dick Liddil and Jim Cummings were in the robberies, or that I thought Frank was trying to lead an honest life, and was different from Jesse, or that Frank would move to different places when Jesse would go to where he was, and when the detectives would come after Jesse, Frank would have to leave, or that Jesse James, Wood Hite, Clarence Hite, Dick Liddil and Jim Cummings were at my house just before and after the Winston robbery, and that Frank James was not. Did testify before the Coroner's inquest over Wood Hite's body, but I did not state at that inquest that I had not seen Frank James for two years, or that he had not been at

my house or my brother's in that time.

On Sunday, December 5, 1881, Bud Harbison and William Jacobs were at my house. They reached it in the afternoon. We had dinner that day between 12 and 1 o'clock.

*Mr. Glover:* In what room of your house was Wood Hite killed?

He was killed in the dining-room. I don't know how long after that his body was taken upstairs. Refuse to answer whether his body was taken upstairs. I had nothing to do with his killing. I do not know who took the body upstairs or how long it remained there. I didn't go upstairs to see it, was not in the room afterward, and haven't been in it since. I don't know when the body was taken upstairs. I was there that night. Didn't see anyone that evening but my own children. I don't know who took Wood Hite's body down-stairs. Saw no coffin there that day. Did not see the body carried out. Don't know when the body was taken out. Didn't tell William Jacobs nor Bud Harbison nor any one that Wood Hite's body was up-stairs. He was buried about two hundred yards from the house. His body was covered with a sheet when I saw it after it had been exhumed. Hite's body had been out there about five months before I saw it at the time of the inquest.

The Court ruled again that Liddil's connection with the killing of Wood Hite, or his whereabouts on the day of Hite's death, were not to be inquired of by this witness.

*Mrs. Bolton:* Wood Hite was

killed in December, and I left that house in February, understood Wood Hite and Jesse James were cousins.

*Elias Ford.* Was at Mrs. Bolton's on December 5, 1881. Wood Hite was killed in the dining-room of that house about 9 o'clock. Got there about ten minutes after the shooting. Did not see the body taken upstairs. The body stayed up-stairs till about 9 o'clock in the evening. Refuse to answer who took the body out and buried it, on the ground that it would criminate myself. Saw the body taken out that night. Four persons carried the body out. The body was buried—about one-quarter of a mile east of the house in the brush. There was no coffin. He was wrapped in a blanket and covered with earth and some stones and brush. He was only partially clad in his clothes. He wore a gray suit when he was killed.

*To Mr. Wallace:* Dick Liddil was shot and wounded at this time and was a long time recovering from his wounds.

*Ida Bolton.* Am thirteen years old; know Frank James. Saw him at Uncle Charley Ford's a mile and a half east of Richmond, Missouri. Lived there with him (Charley Ford) two years. During the second year saw Mr. James, who went there by the name of Hall. Saw him five or six times. Jesse James was there too, going by the name of Johnson. That summer I also saw Dick Liddil, Clarence and Wood Hite. Liddil went by the name of Anderson, Clarence Hite by the name of Charley Jackson and Wood Hite by the name of Grimes. Saw defendant there



two or three weeks later, and again saw Frank James there later in the summer. He wore side whiskers; last saw him there in October, 1881. Clarence Hite and Dick Liddil were there. When defendant left that time, Clarence Hite and Uncle Charley went with him. I know Jim Cummings. I saw him in 1880, in the fall. That is the last time I saw him.

To *Mr. Glover*. Came here Friday. Mr. Ballinger brought me and paid my expenses. Have talked to Mr. Hamilton and Mr. Wallace about what my testimony would be; have not talked it over with my mother, Mrs. Bolton; last I saw Frank James he was dressed in black coat, vest and pants. Saw Clarence Hite the same day. He wore dark clothes and a drummer's hat; saw Dick Liddil that day, too. They left that day at 5 o'clock on foot, all walking together. Uncle Charley Ford went with them. Cummings had not been there that year. Jesse James came there the first day of May. The first time Dick Liddil came, in the summer of 1881, Jesse James was with him. Dick wore a gray and Jesse a black suit. Dick had a mustache, but no whiskers, and Jesse had whiskers about an inch long. Dick had whiskers in the winter. Frank James was there from May 1 to May 6, 1881. Dick Liddil was there the first part of June. Clarence Hite was there some time in July. Wood Hite was there off and on all through the summer; don't remember the day of Wood Hite's death, but remember the place. He was killed in the morning about 7 or 8 o'clock. Uncle Bob Ford and ma and Dick

Liddil were present when he died; didn't see him taken upstairs. He was buried in the night. I don't know who took him out or who buried him, or how he was buried, or where; left the house in January, 1881, after the time an armed posse raided the house; remember mother going to Jefferson City to see Governor Crittenden and her return. Dick Liddil left about a week after her return; last time Jesse James left there was during the Christmas holidays of 1881; saw Cummings there in the fall of 1880; first saw him in 1878. Never saw him but twice; have never heard of his being in that country in 1881.

*Willie Bolton*. Am fifteen and brother of the last witness; know the defendant; first saw him in May, 1881, about a mile east of Richmond, at the Harbison place when Cap and Charley Ford were living there. Saw Frank James four or five times that summer. He had side whiskers at that time.

*Cross-examined*. Remember Wood Hite's death; he was killed about 8 or 9 o'clock on the morning of December 2, 1881. I saw the body that night; heard the shooting at the time, went to the house from the barn, where I had been milking; did not go into the room where the shooting occurred. I don't know when or by whom the dead body was taken upstairs. His coat, vest and pants were removed and a horse blanket put on him. He was then taken down and buried in the Wood's pasture. In a conversation with A. Duval, in the presence of W. D. Rice, did not say I knew Frank James at our house as Mr. Hall, but did not

know him to be Frank James, but that I intended to swear it was he anyway; testified before the coroner on the occasion of the inquest over Wood Hite; did not tell Rice my mother had made me swear the way I did at the inquest.

*James Hughes.* Lived at Richmond since 1830; have seen the defendant since I have been here. I saw a man that resembled him very much last fall a year ago at the depot in Richmond. I conversed with him; think the defendant is the man; saw him at the depot in September or October, 1881. There were three gentlemen wanting to get off on a freight train to the R. and L. Junction. The train didn't come, and the party I refer to asked if there was any other way to get to the junction. I looked at my watch, and said it could be made by taking a hack. The prisoner and the two gentlemen who were with him got a 'bus at Mr. Swash's livery stable and went in the direction of the junction.

*Joseph Mallory.* Have lived in this county about forty-three years; remember hearing of the Winston robbery; lived eight miles west of Gallatin and four miles northeast of Winston; have seen the defendant before at Mr. Potts' shop getting his horse shod. It was Thursday morning prior to the robbery at Winston. He and another man were there together. The other was a slender man of ordinary height, a little humped in the back. They were getting a horse shod—a small bay nag; defendant was holding the horse. I and he conversed there about most everything relative to Gar-

field's assassination, and so on, and defendant said he was going up to Nodaway to run a race there at the fair. Mr. Potts said they came from Caldwell, and they themselves said they came from Ray county.

*Cross-examined.* Never saw any other strangers get horses shod at that shop. The other man present when the horse was shod was clad in a dark suit, but not of a solid color. Mr. Whitman and a Mr. Wm. Hughes were also there; remember when the horse was shod the man went to pay Mr. Potts and said, "This is all the change I have got," pulling out some silver. The man that held the horse had whiskers on his face and chin about three or four inches long, of rather a light color. After I left the blacksmith shop, I saw the two men going west; did not see defendant after that, till I saw him in jail here; believe he is the man I saw at Mr. Potts' shop.

*Jonas Potts.* Live in Daviess county, about four miles northeast of Winston; saw prisoner once at Independence, and before that at my shop in the latter part of June, 1881. Shod a horse for him. There was another man with him with full mustache and whiskers, which I think were colored. I met this other man here the other day. I knew him the moment I saw him. On the first time the horse shod was a sorrel horse of good size with a blaze on his face. On that occasion my dog ran against the shoe box and scared the horse, and he ran out of doors. This was shortly before noon. We had some little conversation when it came to paying. There was fifty cents short, and the other man

(James) said he would play me a game of seven-up whether it was \$1 or nothing. Told him I had no time, or he couldn't say that twice; had to send out and get change. On the other visit there came a slender fellow with defendant. A slender man, tall, light-complexioned, with light whiskers and mustache, and a couple of black teeth. The other man called him Clarence. They came a little after sun-up and had us get them breakfast, and I shod a little bay mare for defendant. Had considerable talk with the parties when they called the first time. Mr. James did most of the talking both times.

*Cross-examined.* Mr. James came with a different companion each time. At the first visit Liddil wore a heavy mustache and short whiskers all around his face. James had side whiskers that were darker than his mustache. Liddil wore a light plaid suit, rather worn, and a black hat. He had on boots, and the other man also. Mr. James' companion on the second visit wore light, grayish clothes. On this second visit Frank James talked a long time with Squire Mallory. This was about the thirteenth and fourteenth of July, 1881. The Winston robbery was on the fifteenth; had never seen Liddil before, but was under the impression I had seen Mr. James at the Kansas City fair, when Goldsmith Maid trotted there, and at the Hamilton Fair. First saw Mr. James after his arrest at Independence. When I got a good look at him, I was perfectly satisfied he was the man. Never told John Dean after I had been to Independence that I had never seen Frank James before; don't

remember telling G. H. Chapman that I had no way of telling whether Frank James was the man whose horse I had shod. I never made a similar denial to Robert Simpson, turnkey of the Independence Jail; will explain my wife's shaking her head when Mrs. Annie Winburn asked her if Frank James was the man who ate at our place, by saying that she shook her head because she didn't want to tell; because there were too many sneaking round and listening; never said on Saturday last in the court house yard in presence of F. W. Comstock that from what I had heard of Liddil's testimony, he might have had a horse shod at my place, but that I had no recollection of the transaction. At the shop when I shod his horse, the defendant gave me his name as Green Cooper, and said that he lived in Ray county and was a cattle dealer. I believe I have seen the little bay mare I shod on the trip in a livery stable at Liberty; think I can recognize my work when I see it. I saw this mare about a month or six weeks after the Winston robbery. I was going through the stable, when a boy showed me the mare telling me not to go too near her, as she was a kicker and was Jesse James' mare. Believe those were the shoes I fitted up for the mare.

*G. W. Whitman.* Live in Daviess county, four miles northeast of Winston; saw prisoner at Mr. Potts' shop on the fourteenth of July, 1881. He got a mare shod there on Thursday morning. There was a man with him with light whiskers and just a patch on his chin. He had a small-sized bay mare. Squire Mallory and defendant did all the talking,

except that as the two strangers left, defendant, in reply to a remark of mine, said he thought Mr. Potts had done a good job; have since seen the defendant at the June term of court and recognized him as the man I saw the morning in July, 1881.

*Frank R. O'Neill.* Live in St. Louis, and have been with the St. Louis Republican as reporter for ten years; know the defendant. First saw him in October, 1882, before he gave himself up. Had an interview with him and published the same by consent. Stated in that interview that he went to Nashville in the fall of 1877, being then in ill-health; that he farmed and drove for the Indiana Lumber Company, and lived a hard, laborious life for four years; that he was well known in Nashville as B. J. Woodson; that there he met Jesse, whom he had not seen for two years; that he left Nashville. He also talked about Cummings and described him as a man easily frightened. Cummings went away and they were afraid he had gone to give the boys away. Ryan was arrested shortly after. What the defendant had done since that time was passed in the interview by mutual consent. He spoke of Cummings as a lazy man who drawled in his speech. He said, too, that Jesse, Jim Cummings and Dick Liddil were all at Nashville at the time he was; that after Ryan was arrested he and Jesse left. He said he went unarmed while in Nashville, and that he never had any trouble there except on one trifling occasion, and that he numbered several of the officials among his friends. When armed he carried a Winchester and a

pair of Remingtons. Defendant read the interview as printed. He noticed no error.

(Asked where the interview took place, witness begged to be relieved from stating further than that it occurred in Missouri; defendant's wife was present. Witness declined to state who were present besides those named, and was given till morning to decide whether he would answer touching the place and time of the interview and the names of the parties present.)

*Mrs. Jonas Potts.* Have seen defendant at my house the thirteenth or fourteenth of July, 1881. The Winston robbery was the fifteenth. The man who came with him had light whiskers and blue eyes, and had a stoop in his walk. When they left the breakfast table the taller one, or defendant, said, "Clarence, make out your breakfast."

*Rev. Jamin Machette.* Reside in Caldwell County, Missouri. I remember the Winston robbery. Was living three miles from Winston at the time; saw Frank James at my residence on July 14, 1881. A Mr. Scott was with him. Scott was five feet eight or nine inches high, brown hair, a few freckles and a very ill-formed mouth, with irregular teeth; somewhat slim. They came to my house about 11 o'clock. One of the party rode a bay, the other a sorrel, with two white hind legs. They wanted to know if they could get dinner; said I would see my wife, who objected somewhat as she was washing, to which they remarked they were in no hurry, and I then told them that they could be accommodated. We watered the horses, which they tied to my shade

trees in the orchard and then inquired for feed. I stepped into the field and brought bundles of oats. One of them inquired if they were fresh cut, and being told they were, said they didn't want to feed any green food, and I gave them a blunt ax and they cut off the green part; noticed they were wearing heavy goods for that time of the year, and had gum coats or blankets strapped to their saddles. One gave his name as Scott from Plattsburg, Clinton county, and the other, the defendant, said his name was Willard, and had been in Clinton county about eight years, and came from the Shenandoah Valley.

Inquired of Willard where he had been between the Shenandoah Valley and this section, and he never answered me, but said, "What do you think of Bob Ingersoll?" We discussed Bob for some time, till we differed so that I went to my library for a volume of his lectures, which I gave Willard, and he read some time till he fell asleep. At dinner we talked about Clinton county. I asked some questions about Lawson, which Willard answered, and then later I asked about Greenville, Clay county, once called Clintonville, which Willard did not answer, but said, "What is your judgment of the Talbott boys?" We then discussed the Talbott boys, and Willard expressed himself with indignation at boys doing crimes of that kind. Willard wanted to pay for the dinner and I declined at first, but finally took fifty cents. In conversation with Scott he observed he would take me for a minister of the Christian church, and I answered that I was; said

he thought if he ever united with the church he would join the Christian church, and referred to his wife as a Presbyterian. Willard acquiesced in that, but said there was no man ever lived like Shakespeare, and declaimed a piece and remarked, "That's grand!" which observation I indorsed. Finally Scott said something about going, and I invited them, if they ever came that way, to call again, which they said they would be pleased to do, that they were going to Gallatin, where Willard said he had not been for ten years; recognize defendant. When he stopped at my house he had whiskers on the side of his face; am not certain about the chin. He had a tolerably fair mustache, and his whiskers were darker outside than near the skin.

*Cross-examined.* Am this confident the defendant is the man who stopped at my house that if he hadn't paid for the dinner I would say, "Mr. Willard, I would be pleased to have the amount of that board bill."

*Ezra Soule.* Live two miles northeast of Winston; have seen the defendant; saw him on the line of the railroad, about one-fourth of a mile south of the track in the country, nearly two miles from Winston, between 4 and 6 o'clock on the day of the robbery. Was in the woods looking for berries. Talked to him about an hour. We talked about the weather and Kansas. He pretended to be buying fat cows for that market; said he had lost a cow, and had been looking for her; said he had a partner. I saw no partner, and on the saddles were packages like blankets or gum coats. He said his part-

ner was thirsty and had gone to D. C. Ford's for a drink. In about three-quarters of an hour a man came up from the opposite direction, whom I took for the partner.

This partner appeared to be twenty-two years old, five feet eight or nine inches high, slender, hollow-stomached, with shoulders that leaned forward, and a general kind of a consumptive mien. His beard was a lit the yellow fuz, and he looked as if he was trying to raise a mustache. Before seeing the man I struck on an old road not traveled for twenty years. There I found a horse hitched, saddled and bridled, and twenty yards from that was another. They were both bays, or rather one was a sorrel with white stockings on her hind legs, and then I saw this man. By and by his partner came up, and was much more sociable and communicative than the one first met. Next day I went to the trestle work on the railroad, where I discovered four horses had been hitched, and then I found another, and here is a little trophy I found (producing a halter-strap). I also saw a halter-strap picked up there by another man, which looked as if it had been cut off or broken through; recognized the defendant as the man I saw that night.

*Cross-examined.* Thought I had found a horse thief, and that he had a partner. The next time I saw this man was in the court house here in February, 1883; don't know that he was armed, but from the way in which he handled a coat on the ground, it seemed as if there was something heavy in the pockets; kind of

imagined there might be some bull-dogs there, but I didn't see them. I noticed that the whiskers of this man were darker on the outside than near the skin; mistrusted they were dyed.

*August 29.*

*George W. McCrow.* Live in Port Osage, Jackson county; know Dick Liddil for the last five years; heard of the Winston robbery. A man left a wagon at my house after that robbery, a stranger; it is there yet; know Lamartine Hudspeth. He lives six or seven miles from me; know a sorrel horse he owned before and after the robbery.

*Cross-examined.* Have seen other sorrel horses at Hudspeth's. Am a brother-in-law of Mattie Collins, wife of Dick Liddil.

*W. R. McRoberts.* In spring and summer of 1881, was agent for the Wabash at Richmond. The express books were kept by W. L. Stewart; an entry of the shipment of a box from Lexington, Missouri, on May 18, 1881, is in Stewart's handwriting; it reads: "W. B. 118, May 18, Lexington; one box, 40 pounds; J. T. Ford; back charges \$1.95; our charges 35 cents; total, collect, \$2.30."

*Ella Kindigg.* Live four miles from Winston; have seen Dick Liddil here; saw a man with features like him on July 15, 1881, on the day of the Winston robbery. He had dark hair and whiskers. He came about 11:30 a. m. and stayed to dinner; no one with him. My mother and brother were there, and two of Mr. Mapes' girls. He had on a linen duster.

*Mrs. Samuel A. Kindigg.* Am mother of last witness who

testified; have seen a man called Dick Liddil in court; looks like a man that took dinner at my house on the morning the Winston robbery occurred. The man was five feet nine inches high, with dark hair, light eyes and chin whiskers; just started out; don't remember a mustache. The day I saw Liddil here asked him if he had ever seen me before. He said he had taken dinner at my house.

*Cross-examined.* Did not need to have Liddil pointed out to me; knew him when I saw him. My conversation with him occurred last night on the sidewalk.

*Wm. Bray.* Live at Hamilton. In the summer of 1881 lived two miles west of Hamilton, in a story and a half house, with little stable back of it; have seen defendant. I saw him, or a man that looked like him, at my house some two or three weeks before the Winston robbery; found defendant and three others there when I came home. One of them was sick with the toothache. This was a low heavy set man, with about a week's growth of sandy beard, and the other was a smaller man, with a large tooth. Have seen Dick Liddil since; believe him to be the man that was out in the stable most of the time; took the man with the toothache to town and he had his tooth pulled.

*Cross-examined.* The party with the toothache was almost five feet eight or nine inches high. The defendant wore burnside whiskers of tolerable length, say two or three inches long, of light sandy color.

*R. E. Bray.* Am son of fore-

going witness; saw a man looked like prisoner at my father's house two or three weeks before the Winston robbery. There were three others with him. Three went away on horseback, and a low, heavy-set man, with the toothache, with my father in his buggy; was told Dick Liddil was here, and when I saw him I thought he was one of the men who stopped; don't know that I would have recognized him if I had met him on the road.

*Mrs. William Bray.* Saw defendant at my husband's house some ten days before the Winston robbery. Three other men came with him. One was a spare-built man with light hair, large teeth, slight mustache, and little or no beard. The heavy-set man had sandy beard of two or three days' growth; defendant looks to me as like one of the men that was at my house; talked to the defendant that day about the sickness of the heavy-set man. He thought his sickness was caused by the use of creosote for the toothache; defendant told me they stopped the night before at a Mr. Wolfenberger's, where they pulled and ate cherries in the morning.

*Cross-examined.* The man called Liddil came to the house with the heavy-set man that was sick and asked for a vessel to carry water out to him. The heavy-set man got off his horse and got in the shade, so that his companion had to call out for him. He called him Dave, and Dave answered him. After that two others came up. They all had dinner at our house. They spent most of the time out of doors in the shade, in their shirt sleeves; defendant that day wore

burnside whiskers, tolerably long, and a little thin mustache; don't think he had any chin whiskers. He had a dark coat, grayish pants and black hat. Think I would recognize the defendant more easily than I would the man called Liddil should I meet him in the road; would recognize the defendant more easily because he sat facing me at the table, and I talked with him. On three or four occasions when he came in the house, remember talking with him about physicians, and he said the sick man was anxious to go to Cameron to see a doctor there. They went south as they left.

*Mrs. David Franks.* Saw a man at our house eight miles west of here, that represents the defendant from the face on July 13, 1881. There were three men at dinner there that day. One was a tall, slim man that wore burnsides. Another was slender and lightly complexioned, while the third was heavier.

*Cross-examined.* Defendant's hair was dark brown and his whiskers blacker than his mustache. He had a face tanned by riding in the wind and wore dark clothes and boots. This was two days before the Winston robbery. One of the other men wore a light checked plaid and a dark hat. We live about three miles southeast of Mr. Jonas' Potts blacksmith shop.

*Frank Wolfenberger.* Live eight miles southwest of Gallatin; have seen defendant here in court. Saw him before at my home the latter part of June, 1881. Three other men were with him; recognize one of them as Dick Liddil. Another was a heavy-set man of about five feet

ten inches. The other was not so tall, and round-shouldered, and in walking let his shoulders come in together forward. He had a slouchy gait. He had light whiskers, very short. The other heavy man had whiskers all round, that looked as if he had let them all start growing at the same time. They had been helping themselves to feed, and then went from the barn to the house. We washed for supper, and defendant and Liddil blackened their boots. The sick man said he would wait till morning, and the slouchy one didn't think he would black his boots at all. The sick man retired early, and in the morning asked me to examine his mouth, which I did. The evening previous defendant asked if we had any opium. I said no, but as my wife had been sick I had some morphine; fixed two doses in one; defendant observed "I reckon it is not poison," and the heavy man took it; defendant's name was McGinnis, and the sick man's name was given as Johnson.

Defendant said he was married and so was the sick man, and the others were single; defendant seemed to know all about fair horses, but more about runners than trotters. In the morning Liddil helped me to load my wood. The slouchy man produced a bottle of stimulants and offered it to me, but I declined. Then they sampled it lightly themselves. The arrangement with the defendant had been that if the sick man was not able to leave I should take him to Kiddy in a buggy; prisoner gave me fifty cents to buy quinine with, but I still owe him that sum, as he had left before I returned



with the quinine. Since I first saw the defendant in the Gallatin jail I went in there by myself, and after some preliminary talk with the defendant, I said: "I guess I had the pleasure of entertaining you and three other men one night." He looked at me slightly and then down and said: "I have no remembrance of you." Said I: "I guess I did. You and three other men, and one was quite sick." He looked up in a kind of study and shook his head and said: "I don't remember. I have no recollection of it." Have since seen Dick Liddil and recognize him as the man I saw at my house.

*Cross-examined.* Defendant when at my house wore burnside whiskers about three inches long, and a light mustache. Liddil at that time had a beard all over his face, about three or four weeks' growth. His mustache was not so long as now. Am positive the defendant is the man who was in my house on that occasion.

*Mrs. James Lindsay.* Live at Chillicothe; am a sister of last witness; saw the defendant at my brother's in June, 1881, about two weeks before the Winston robbery. Three others came with him; recognize Liddil as one of them. Had a mustache and had not recently been shaved. Another of the three, who was sick with neuralgia at the time, had a beard all over his face; first saw defendant, who rode up to the gate, and said that they had a sick man with them and asked if they could be entertained for the night. The fourth man was rather green looking; remember the defendant having a conversa-

tion on some religious topic with my sister-in-law. He seemed to be a very religious man; am sure the defendant is the man I saw that day.

*Cross-examined.* The man I saw at my house had burnside whiskers and a mustache. In the morning after, Frank James was eating cherries under the trees and Liddil was with him; would have known either the defendant or Liddil if I had met them on road before the surrender; never forget a face.

*Dr. Wm. E. Black.* Live at Gallatin; have seen the defendant since the surrender; had a few words in the jail with him; talked with him in jail at Independence; he spoke of the merits of different actors; he said he had seen Keene play Richard III. at Nashville, and also seen Lawrence Barrett, McCullough; spoke of Ward as a favorite actor with him, and that he delineated the Shakespearean characters he played better than any one he knew, being a young man; he also spoke of Miles.

*D. Mathews.* Live in Clay county, near Kearney, four and a half miles from Mrs. Samuels; lost a horse on June 19—before the Winston robbery—a sorrel, with a blazed face and white hind feet; got him some time in August after the robbery; he was at a farmer's by the name of Miller, in Ray county.

*Wm. R. Roberts.* Live in Clay county; remember the Winston robbery; took up a bay mare about the end of July or first of August. She was taken up on my farm in Clay county and I turned her over to Sheriff Timberlake, who told me that he was

going to take her to Liberty. To the best of my recollection I took her up about a week after the Winston robbery.

*Cross-examined.* The mare had a small star in the forehead and a white left hind foot.

*Frank R. O'Neil* (recalled). Having stated that he had counseled with no one touching the questions submitted last evening for his answer today, was informed by the Court that the law did not regard communications to the press as privileged. *Mr. O'Neil*, at the suggestion of *Mr. Shanklin*, submitted a paper to the court containing a statement of his position. It was a disclaimer of any attempt to obstruct the process of justice, but stated that after giving his pledge of confidence to the defendant before the surrender, he

afterward, to some extent, acted as adviser for defendant, and should on that account be excused from answering. He further declined to state whether any of the parties present before the surrender with the defendant and himself were called as witnesses for the defense in the case. The Court reserved its decision on the question of compelling witness to answer.

*James R. Timberlake.* In 1881 lived in Clay county, and was its sheriff; knew *Mr. Roberts*. At that time he lived in the northeast portion of the county; went out to his place and got a bay mare with a star on her forehead shortly after the Winston robbery; kept her at Liberty for ten or fifteen days, and then the owner claimed her. The owner was named *Graham*.

*August 30.*

MR. RUSH'S OPENING FOR THE DEFENSE.

*Mr. Rush* began by returning thanks for the maintenance of health on the part of all concerned in the case so far, as health was a great factor in an intelligent and wise consideration of so important a case. He then enlarged upon the importance of the case, and declared it the greatest that had ever engaged the attention of a jury in Daviess county. At the outset *Mr. Wallace* had declared his purpose to establish a conspiracy, and to follow the band of conspirators from its organization in 1879 in Nashville, up to and even into the Winston robbery. He had done this to a certain extent, but by the testimony of *Dick Liddil*—and his nature and character would be exhibited to the jury in all its immoral enormity. Whatever corroboration other witnesses had given the continuous story of the state—these witnesses and their characters would be exposed for the contemplation of the jury. Coming to the facts alleged to be proved, *Mr. Rush* averred

Frank James was not at the Winston robbery. The only witness who placed him there was James A. Liddil, and his testimony was of such a character that, unsupported, it could not be credited. Moreover, in turn, the speaker alluded to the Bolton and Ford witnesses, and said that people capable of aiding in such a tragedy as was enacted there, and with the ghost of recent death in their house, were able to entertain guests and make merry with neighbors, had such blunted moral sensibilities that the truth was not in them, or they would lie for a purpose, and that purpose was manifest. Referring to the witnesses in this section of the country, the speaker promised to show by witnesses present at the blacksmith shop and other places purported to have been visited by "the gang," were mistaken in identifying any one of them as Frank. Moreover, a witness on the train would be introduced to show Frank was not on the Winston train, and that the man seen in the woods a few hours before the robbery, by Ezra Soule, was not Frank James. Coming again to Dick Liddil's evidence, the defense claimed his story in court and his tale to Governor Crittenden did not agree, and that lying thus in any one particular his testimony was unworthy of belief. The speaker then took up the impelling motive of the interested witnesses in this case, and the nature of the prosecution. Dick Liddil's motive was that of revenge, superinduced by cowardice. He killed Wood Hite, feared Jesse and betrayed the band. He agreed to swear them into prison or to the scaffold, and he is merely fulfilling that agreement. The Boltons and Fords had the motive arising from the fact that Bob Ford had assassinated Jesse James, a brother of the defendant. The motive of the prosecution was revenge. The officers of Kansas City had been cheated out of the reward offered for his apprehension by the surrender of the defendant. Referring again to Liddil, the Boltons and Fords, he declared a conspiracy existed among them to down the defendant. As to the witnesses, one and all, in this region of the country, the speaker in answer to their alleged identification of the defendant would say they had seen a man, but the defense would prove that man was not Frank James. The

speaker here enlarged upon the character of the defendant. For fifteen years he had been hunted through a country grid-ironed with railroads and with a web of wires overhead to ascertain his whereabouts. Yet he lived quietly and led a laborious life at Nashville from 1879 to March, 1881. The defense admitted this and confessed he left because of Bill Ryan's arrest. This was not the first time he had been forced to abandon his home, because Jesse, with outlawed companions had driven him out in the world. He, Frank James, was an outlaw, made so against his protest and against his appeals. The speaker then referred to the civilization that denied James citizenship and kept him from his home. He referred to the fact that other men, poor Bill Poole among the number, had been warned away from here, and returning had been shot down from behind. The civilization that permitted a party to sneakingly surround his mother's home, maim her and kill an infant brother in cold blood, warned him not to trust himself near people capable of such deeds of violence. He had been refused amnesty; had had governors refuse him clemency. This was not the place for him, and the defense was prepared to prove he was not in Missouri in 1881, nor at the Winston robbery.

#### THE WITNESSES FOR THE DEFENSE.

*Samuel T. Brosius.* Live at Gallatin; am a lawyer; was on the train that was robbed at Winston. We were about on time. There was a commotion on the front platform of our car, and two men commenced firing as I thought at the time, directly through the car. As the two men came in they called out, "hold up" or "show up," and I looked squarely into the face of the smaller of the two men to see that he noticed me; I held up my hands. As soon as the shooting commenced I saw that the conductor was hit. The two men

continued to advance through the car till the larger of the two came up and nearly passed, when the conductor commenced sinking. He caught him, and the other man then came up on the other side. They hustled the conductor out on the platform, then came back, and passed me again, going out at the front end of the car. There was firing on the outside after they passed out. The larger man was full-faced, with beard all over his face, and would weigh one hundred and eighty to two hundred pounds. He was perhaps a full half head

taller than the conductor; do not think defendant is the man.

*Cross-examined.* Noticed that the bullets all hit in the ceiling. The big man did not have on a duster; could not swear to a stitch of clothing that either of the two men had on. The smaller man was dark-complexioned and had whiskers three or four inches long. Plenty of people have heard me tell about what I saw. They would tell me that I was too scared to notice anything, and I would assent to that to avoid further inquiry; don't remember telling parties who came to me after the robbery for a description of the robbers that I could not describe them. Believe I told somebody that the muzzle of the robber's revolver looked pretty large and that I thought that it was an eight-inch navy revolver; did not tell Mr. T. B. Gates, the day after the robbery, that I could not recognize either of the men, and that I was under the seat; don't believe I could recognize either of the robbers right now if he was brought into the courtroom and placed before me. If any citizen ever said that I told him that I was under the seat, he lied.

To *Mr. Wallace.* Don't remember a conversation with Mr. Eli Dennis in which I stated that the shooting was done so quick and there was such confusion that I couldn't tell how the men looked or anything about it. Don't remember telling Robert L. Tomlin on the first of August, after the robbery, that one of the robbers looked as though he was fifteen feet high, and that I was so excited I couldn't tell how the men looked at all. If I had such a conversation I made the state-

ments to avoid inquiry, as so many people were asking me about it; did not tell my law partner, Mr. Gillihan, in the presence of C. L. Ewing and A. Ballinger, that I was so badly excited I could not remember anything as to how these men looked. When I described them before, it was as I did today—that they both had whiskers all over their faces.

*Re-cross-examination.* Am certain the defendant is not one of the men I saw on the train; went to Nashville with note from the defendant. Did not go there to get testimony to support an alibi. Did not see accused until three weeks after my return; am not interested in this trial. If defendant is guilty I want him punished.

*Fletcher W. Horn.* Live in Nashville, Tennessee; am now connected with the detective force of that city. I know B. J. Woodson. I got acquainted with him in summer of 1877, and last saw him in March, 1881. He resided most of the time in the White's Creek settlement. He was either farming or hauling logs for the Indiana Lumber Company. Saw him last in Nashville, about the twenty-sixth of March, the time that Bill Ryan was arrested. When I knew him he wore sandy whiskers, short on the sides, and fuller on the chin, say four or five inches long. He was a hard working man, who conducted himself as a gentleman. His associates were men of standing and position. Have seen Dick Liddil there in 1879 or 1880. Knew him as Smith. Never saw Liddil and defendant together. Knew Jesse James as J. B. Howard. Saw Howard and

Woodson together once or twice in pool room. Knew Jim Cummings. Did not know the Hites. Never saw B. J. Woodson in company with Liddil or Cummings. Saw very little of Liddil, and that only by accident.

*Cross-examined.* Did not know Woodson and Howard were the James Brothers, or I would have tried to take them.

Dick Liddil deported himself well while in Nashville. Defendant has since alluded to me as a "Falstaff". Never saw any of the men spoken of in Nashville. After the arrest of Bill Ryan, went with Mr. Sloan to Mrs. Hite's, and sat around while he asked questions. Mr. Sloan professed at that time to be attorney for Frank James. Wrote a letter to Thomas Furlong, in St. Louis, asking transportation for Mr. Sloan as a witness for the state; also for Mr. Moffatt, Wm. Earthman, Mrs. Hite and myself.

*Raymond B. Sloan.* Am an attorney. Live in Nashville. Knew defendant by the name of Woodson some time during the winter of 1876-1877. He was living in the old Felix Smith house, that had never had a light in it since the war. Last saw him in Nashville, March 26, 1881. He had light sandy whiskers all over his face, short on cheeks, longer on chin, a mustache. Don't think he showed evidence of shaving any part of his face.

*Cross-examined.* Did not know that from February 5 to March 26, 1881, Woodson or James was not doing anything, or that he was living in Nashville with Jesse James. Went up to Mrs. Hite's as attorney for

Frank James, and reduced her statement to writing.

*Mrs. Elizabeth Montgomery.* Live a mile and a half east of Winston. Remember the Winston robbery. Some strange men ate at our house that night. The clock struck seven before they finished. The younger man was the taller and light complexioned, with burnside whiskers. The older man had dark whiskers and mustache, and dark clothes. One horse was a bay and the other a shade lighter. They had some bundles tied to their saddles.

*Mr. Slover.* Is the defendant one of those men? I think not, but cannot be positive. Think both horses were bay but one was lighter than the other. The bigger man had whiskers all over his face, chin and all.

*Miss Missouri Montgomery.* Am a daughter of last witness. Remember the night of the Winston robbery, and remember two parties coming to our house that evening about six o'clock on horseback. They remained there half an hour, and got their suppers at the end of the house in the open air. Don't think I saw defendant there. Wouldn't say positively. Don't think he resembles either of them.

*Cross-examined.* The older of the two had whiskers all over his face of a brown color. He was a rather heavy set man, and wore dark brown clothes. Never saw Jesse James. The other man was tall and very slim; had light hair and no whiskers, except a little on each side. Neither of them had a large blaze-faced sorrel horse.

*John L. Dean.* Am a farmer and live seven miles southwest of here. Know Jonas Potts. Re-

member a conversation with him at his shop November 20, 1882. He said he had been to Independence to see Frank James, and that he had never seen him before. Remember on another day two men came up to Potts' shop in a carriage and wanted to get a neck-yoke fixed, and that Potts left the shop, and when he came back was somewhat excited, and said they were the men he had shod horses for before the Winston robbery. The larger of the two men was a low, heavy-set, dark complexioned man, with heavy whiskers. The other was about my size, with fair complexion and no beard at all.

*Cross-examined.* Told Mr. Rush what I knew about this matter. Don't remember talking to Mr. Rush about this case at Winston in April or May last. Don't think Potts was in liquor when I talked to him.

*Marion Duncan.* Am a farmer and live southeast of Winston. Know Jonas Potts. Remember Potts' saying to me that Jesse James was at his shop; that he had seen his picture at Winston, and he was the very man he had shod a horse for.

*Cross-examined.* Mr. Potts had been to town that evening and was pretty boozy in that conversation.

*Gus A. Chapman:* Know Mr. Potts. Remember him saying to me after his return from Gallatin jail, where he had seen defendant, that he didn't know if he had ever seen him before and could not tell.

*Wm. E. Ray:* Know Frank Wolfenberger. Saw him in Winston after Frank James had been brought here. Did not hear him say that he did not think he would be able to recognize him.

*General Joseph O. Shelby.*<sup>a</sup>

<sup>a</sup> "The afternoon session opened with the testimony of Gen. J. O. Shelby, who came into court with the stride of a dragoon, and with a savage glare in his eyes, which promised trouble. He was shown to the witness chair, which is located a couple of feet below the elevated stage on which the judge sits, surrounded by gaily dressed ladies and less gaudy correspondents. When asked by Col. Philips to state his residence the general maintained a silence, and turned his fierce glance to the various attorneys' table, and to the jury box, in evident search of something. Finally he announced that he desired to see and know the court before he answered any questions. It was suggested that if he would look back over his head he would see the gentleman he was looking for, and following the directions he discovered Judge Goodman; smiled blandly on him and assured his honor that while he had not had the pleasure of meeting him, he was glad to know him now, and entertained the most kindly feeling toward him. All this was in a loud, bluff, genial voice, and it was apparent that the general was disposed to shake hands with the judge if he could just get at him. Judge Goodman fidgeted very perceptibly, as a titter ran through the court-room, and then with a quizzical expression of countenance intimated the witness to defer formalities and answer the question. Gen. Shelby next inquired, after another survey of the opera-

Have for thirty-four years resided in Lafayette county. Live nine miles from Lexington and nearer Page City. Remember Jesse James, Dick Liddil, Bill Ryan and Jim Cummings coming to my place in November, 1880. Was spreading hemp at the time, working some twelve or fifteen men, and when I returned home that evening found four men with horses in my yard. Jesse James was there. Young Cummings I knew before, and this man Liddil passed as Mr. Black at that time. In the morning had a conversation with Jesse James in the presence of Dick Liddil, in which I said that a couple of young men had been arrested for supposed complicity with the alleged bank robbery at Concordia, and that I didn't think they had anything to do with it; and asked Jesse James if he knew anything about that affair to tell me, and he said, pointing to Dick Liddil, there is the man that hit the Dutch cashier over the head. Remember in November, 1881, meeting Liddil and Jesse James in my lane, and when I asked Jesse who was ahead of them he replied, Jim Cummings and Hite. Remember meeting Jesse James and Liddil again in the fall of 1881, and of asking Jesse where Frank was, and of his announcement that Frank's health was such that he had been south for years, and that when I asked the same question of Liddil he announced that he had not seen him for two years. Reckon I know Cum-

mings better than any man except Ford's and his own people. He was at my house a dozen times. He was with me in the Confederate army. Have not seen Frank James since 1872. Believe he sits right there now. With the permission of the court, can I be tolerated to shake hands with an old soldier?

The COURT. No, sir, not now.

Gen. Shelby. Did not see him in jail. Have not seen him since 1872. Am correct about it, sir, when I say that the four parties to whom I have alluded by name did not include Frank James, who was not with them. Mrs. Frank James came to Page City in the spring of 1881. She sent for me and said to me, I am in distress. This man Liddil and others are committing depredations in the south, and they are holding my husband amenable for it, as he has been charged with being connected with them. I have come over on purpose to ask you to intercede with the Governor. I told her there was no necessity for that, and no hope of success. I told her further that Governor Woodson had talked to me at the Planter's House. For Hardin I had no respect at all. She wanted me to interfere in her husband's behalf with the governor. Told her it was folly to do so, and advised her to go home to her father. She didn't stop at my house. She could have stopped there if she had desired. As to the sewing machine, don't know what time the sewing machine

house, where the jury were, and when that body were pointed out to him he bestowed on them a friendly bow and settled himself to answer the question as to his residence." *St. Louis Republican*, August 31, 1883.



arrived there. She simply gave Mr. Birch, the agent at the depot, directions for shipping it, and I don't know where she directed it to be shipped at all. Was only assisting a woman in distress, and if she had been Gennison's wife, the most obnoxious man in the country—. Mrs. James left orders with the agent for the movement of the sewing machine. She was a lone woman, with a little child, and crying, and any man who would have faltered in giving suggestion or aid ought to be ashamed of himself. Have known Frank James since 1862. Have not seen him for twelve years. Got acquainted with him in our army.

*Mr. Wallace.* This sewing machine you didn't see at all? Nobody knows better than yourself that I didn't see it.

The COURT. Answer the question in a straightforward manner. I did not.

*Mr. Wallace.* You didn't have anything to do with it at all? Nothing in the world. You are just as sure of that as you are of anything else?

To the COURT. I would like to know if the Judge is going to permit a lawyer to insult an unarmed man, who is a witness in this case?

The COURT. Every witness comes in here unarmed, sir.

*Mr. Wallace.* What are your initials? If you are desirous of knowing go to this bank here and you will find out. Joe O. Shelby is my name. Then your initials would be J. O. S.? Go to the banks in this town and you will find it Joe O. S.

Look at the way-bill and see if that has J. O. S. as the consignor of that sewing machine! There

may be a great many J. O. S.'s, who in that section have those initials beside you. You had better go and inquire.

The COURT. I won't have any more nonsense of that kind. You will have to answer questions as they are put.

*Gen. Shelby.* You are not protecting me at all.

*Judge Philips.* I simply suggest to the court that under the circumstances this examination had perhaps better be deferred.

*Gen. Shelby.* Not at all. Better let it go on. Now is the time for it to go on.

The COURT. General Shelby, you are a man that I respect and a man with a state-wide reputation as a gentleman. We did not expect such demeanor in this court room. I must admonish you that I can not permit this to go on any further.

*Gen. Shelby.* I want to know from the court, if, after having said what he (Mr. Wallace) has, he is to charge me with receiving a bill of lading as J. O. S.

*Mr. Wallace.* I ask you when Mrs. Frank James came there with a sewing machine to be shipped to Mrs. B. J. Woodson, you did not yourself become the consignor and ship it thence to Independence for the purpose of keeping any one else from getting track of it? No, sir, I did not.

I ask you if this J. O. S. does not indicate that? No, sir, not at all. She arrived there as I related. I gave her a note to Mr. Russell, agent of the Missouri Pacific at Independence, to take it and send her up to Independence. Saw Dick Liddil. Was not brought into court to see if he was the man; neither

you nor anybody else can bring me in anywhere. Nobody knows better than yourself that I was not brought in to look at Mr. Liddil. The man I saw was Mr. Black, alias Liddil, the thief.

The COURT. I want no more epithets of that kind in the court room. Very good, Judge. He has forced it on me. If I am guilty of a misdemeanor, correct me or punish me for it.

The COURT. I shall do it.

Mr. Wallace. You saw Liddil down at Capt. Ballinger's house, afterward, didn't you? You don't propose to invade the household of Capt. Ballinger, a soldier of the federal army? It is very wrong for a rebel soldier to make remarks about what occurred in a federal soldier's home.

Mr. Wallace. The war is over. Gen. Shelby. I don't like to allude to a visit to a gentleman's home. That is indelicate and improper.

Mr. Wallace. Did you see Liddil there? I did, sir. I saw him like a viper, curled up in a rocking-chair.

You saw him again at the hotel the other night, or was that a drummer that you took for him? No, sir; by no means. Were you not about to kill the drummer, thinking he was Dick Liddil? I have lived thirty-four years in this state and never killed anybody yet. Answer the question. I was not. This gentleman was seated at the table opposite to me, and he dropped his knife and fork and looked at me. Have his card in my pocket. He is a Michigan man, not one of your people at all, but a better man than yourself for instance. He was staring at me.

Am not in the habit of staring at men on the street, especially ladies anyway, and I must have made some casual remark about it. Did you get your pistol out? No sir. Didn't the marshal of Lexington see you draw your pistol? No, sir; he is a liar, or anybody else, if he says so.

The COURT. I want no more such remarks as that, General Shelby, or I will fine you \$50.

Gen. Shelby. Dick Liddil had partaken of my meals, and fed my corn to Liddil's horse. That was in 1880, and Jesse James was with him and Cummings and Ryan. Did not know that Jesse James was wanted by the officers. Knew it was asserted that he had been guilty of misdemeanors. Never told any officer where they could find him, but did once notify the Chicago and Alton and Missouri Pacific people that if they were under the apprehension that George Shepard had killed him they were being misled, and that he was not dead. The last time Jesse was at my house was at Page City, in the fall of 1881, where I saw Frank James in 1872, which is the last time I saw him. He was bleeding at the lungs, and Dr. Orear was attending him. Don't know that he was an outlaw then, or that he is one today. Don't know that he was then fleeing from the officers.

He was at my house some sixty or eighty days that time, and everybody knew it. When the four men came to my house, as I have already stated, I told them I could only accommodate two of them for the night. Bill Ryan and Jesse James stayed all night with me. The others stopped with a man from Illinois

named Graham, who had been in the Federal army. Am certain that Ryan was not pointed out to me as the man who hit the Dutch cashier over the head.

(As the witness started to leave the court room he asked permission to go over and shake hands with the defendant. This the COURT refused saying: You can call on him some other time. Whereupon *Gen. Shelby* nodded to the accused as he walked out, and said: God bless you, old fellow.)

*Frank Tutt.* Reside at Kansas City. Prior to that at Lexington. Am a coal-oil inspector. Know Dick Liddil. Remember meeting him in front of Gardener's saloon at Kansas City just after the Ford boys had been pardoned, after the trial at

St. Joe. Mr. James M. Crowder was present. Liddil, when asked where Frank James was, said he didn't know the whereabouts of Frank, and that he and Jesse didn't get along well together, and he hadn't seen him for years.

*Cross-examined:* Had been pursuing the James boys for a couple of months, but never caught any of them.

*James S. Demastus.* Reside in Richmond; am a justice of the peace there. Remember the testimony of Mrs. Bolton at the Wood Hite inquest. Understood her to testify that she had not seen Frank James for about two years, and then at her father's.

*Cross-examined:* She named Wood Hite, Dick Liddil, Clarence Hite and Jesse James as members of the gang.

*August 30.*

*Judge Philips.* Your Honor, General Shelby is at the door and desires the privilege of making a statement to the Court.

JUDGE GOODMAN said it would be permitted.

*General Shelby.* If anything I said during my examination yesterday offended the dignity of this court I regret it exceedingly, your honor. As to what I said in regard to others, I have no regrets to express.

JUDGE GOODMAN. The court had been both surprised and mortified that a gentleman who was so highly respected as General Shelby, and who had a national reputation—for there was scarcely a man in the West who had not heard favorably of Gen. Shelby—should be guilty of such conduct. Nothing of this kind had ever been attributed to him before. He should have reflected that to enter a court of justice in such a condition as he was in on Thursday was not only an insult to the court, but was an act of the greatest injustice toward the man who was on trial for his life, and in whose behalf he had been summoned, for the reason that it prejudiced

his interests before the jury. He asked no apology from any man so far as himself was concerned, but this assault on the rights of the defendant had been so flagrant that the court would not overlook it, and the clerk would be instructed to enter up a fine of ten dollars. The general's conduct had been reprehensible in more than one particular, as the testimony showed that he had drawn a revolver almost at the verge of the court room in one of the hotels of the city.

*General Shelby* said he had listened attentively to the court and was very glad his honor had spoken so fully, as it gave him an opportunity to refute a slander. I am charged with drawing a revolver; it is false and the man who said so said what was false.

The COURT. The information came from the Marshal of Lexington, who had given it under oath.

*General Shelby*. He has lied if he said so!

JUDGE GOODMAN. While on the stand you threatened to call the attorneys for the state to an account for what was said by them in your examination. The attorneys are officers of the court and must be allowed to conduct the case in the interest of the state, in their own way. Any intimidation or threat was in the nature of an obstruction of justice.

*General Shelby*. You use the plural, your honor. It is not the attorneys, but the attorney (pointing at Mr. Wallace).

JUDGE GOODMAN. Had General Shelby been an unsophisticated backwoodsman and had persisted in disobeying the directions of the court he would have simply administered a rebuke and committed him to jail. Such a course, however, would seem to be hardly necessary in the case of a man with the refined sensibilities which characterized General Shelby, and the court disliked to resort to harsh measures with him. So far as the court was concerned the General's apology was ample, but he felt that he had no right to condone the offense of which the General had been guilty in prejudicing the interests of the man who was on trial for his life, and in whose behalf he had been summoned.

*General Shelby*. So far as the term back-woodman is concerned, I have been a Missouri farmer for thirty-four years.

JUDGE GOODMAN. Yes, but you do not claim immunity on the ground of ignorance.

*General Shelby.* No, sir; I never sail under that flag.

The COURT. That is sufficient (and *General Shelby* paid his fine of \$10 and left the court room).

*James C. Mason.* Reside in Ray county; remember Captain Ford stating to me that he didn't think Frank James was at Winston or Blue Cut; that he had settled down and left the boys; remember also a conversation with Mrs. Bolton, when she said that Frank James was trying to lead an honest life, and was a different man from Jesse; that Frank would go away and try to settle down, when Jesse would come to live with him, and the detectives would come and he would have to leave.

*Willie Bolton,* recalled. Denied ever telling James C. Mason shortly after Jesse James' death that he had never seen Frank James, or that the others had been at his mother's house, and had said that Frank James had quit them. He didn't remember ever telling Mason anything at all about the outlaws.

*James C. Mason.* Willie Bolton made at the time and place stated the statement which he just now denied having made.

*Annanias Duval.* Live in Ray county. Know Mr. J. T. Ford. Know Willie Bolton. Had a conversation with John T. Ford, in which he said he never saw and didn't know Frank James, and did not know that he was anywhere in this country. *Cross-examined:* Never heard the Fords say that any of the gang were there.

*W. D. Rice.* Reside three

miles south of Richmond, and half a mile from J. T. Ford. Remember a conversation with Willie Bolton a day or two after the Wood Hite inquest, in which he said he had told a story before the coroner's jury, and that his mother had made him do it.

*James Duval* (recalled.) The horse my brother lost was a sorrel. We got him from Mr. Sawyer, and I found him in February, 1883, in charge of Bob Hall, at Samuels' Station, in Nelson county, Kentucky. The horse was lost November 10, 1880.

*John T. Samuels.* Am a farmer, and a half brother of defendant. Live three miles east of Kearney with Mrs. Samuels. Last saw him in January last. Never saw him from 1876 up to that time. Was at home in the summer of 1881. Was not absent at any time during that summer. Saw Jesse James during that summer about the first of May at my mother's. He was in company with Dick Liddil. He told me he came from Kentucky. My mother and father were home when Dick and Jesse arrived. Heard my mother ask Jesse where was Frank, and he replied he had left him in Kentucky, and that he was in bad health and was talking of going south. She then asked Liddil the same question and received a similar answer. Jesse James was at our house two or three months that summer off and on.

Last saw him there about the last of July or first of August that summer. During that time I saw at our house Dick Liddil, Clarence and Wood Hite, and Charley Ford, and no one else. The James boys and Wood Hite are cousins.

Wood Hite was rather tall, with high forehead, long nose, fair complexion, and beard on his face about one and a half inches long, also a mustache. Jesse was a large man, full-faced, with beard all over his face—a sandy beard, which I don't think was darker than Wood Hite's. Clarence was square built, delicate, and fair complexioned, with bad front teeth, so decayed that they would be quickly noticed. There was a striking family resemblance between Frank James and Wood Hite. Saw Jim Cummings at my mother's house that summer in the last of June, 1881. His sister lives two and a half miles from my mother's. Next saw him July 1, at the same place. He came there the first time with Jesse and Dick Liddil. He was by himself the last time. These parties were there several times that summer. Did not know of my own knowledge where the defendant was that summer. Cummings was rather tall and slim, with light hair—as tall as Frank James, and about thirty-six years old. Last saw him in July, 1881.

*Cross-examined.* Heard that all these men were outlaws. Saw in the papers that they had robbed trains and killed men. They came and went armed. We fed Dick Liddil, though not related to him or Cummings. Knew that Cummings was charged with

horse-stealing in Clay county. Never told of his presence there. Kept his presence there and that of others a secret. In 1876 saw him in company with Jesse and their two wives. Saw him in 1875 and 1874. When I first saw Jim Cummings in 1881 he was on the porch of Mrs. Samuels. The other time he came to my window at night. Charley Ford first came there in July, 1881.

He was there also immediately before the Blue Cut robbery, when they left a wagon, to which Charley Ford's black pony and another horse was hitched. The other horse was Dick Liddil's. Don't remember whether that wagon left in July or August. Think Charley Ford's first visit was in the last of July. He was never there until after the Winston robbery. First saw Jim Cummings there the last of June. Talked to Messrs. Johnson and Philips, of the defense, day before yesterday. Mr. Philips asked me about Jim Cummings. Have heard Wood Hite called Father Grimes because of his stoop shoulders and old ways. He had whiskers all over his face—dark whiskers, darker than Jesse's. Jim Cummings had a complexion perhaps as red as mine, with little eyes. Don't know anything about his education. He could carry on a conversation as well as some other men. Never heard him quote any Shakespeare. There was left in the wagon Dick Liddil, Charley Ford, Clarence Hite, Wood Hite and Jesse James. There were not six men, and the sixth man was not Frank James. They were armed with revolvers. They had guns at the house, two

Winchesters and a shotgun. Liddil had a shotgun and Jesse a Winchester. They got a woman's dress from my mother. Don't know what it was for.

*Mrs. Zerelda Samuels.* Have lived for forty years in Clay county. Am the mother of Jesse and Frank James. Frank was forty years old last January. Have lived three miles from Kearney. Have other children—Mrs. Palmer, Mrs. Nicholson, Mrs. Hall and John T. Samuels. Jesse was killed two years ago next April. Jesse was at my house during 1881. He came there either in May or June. Before that he had not been home for some time. The first time he came Jim Cummings and Dick Liddil were with him—no, only Dick Liddil. Asked Jesse where Buck, or Frank, was, and he said he had left him in Kentucky in bad health. Said, Son, you know he is dead, and I turned to Liddil and he said they had left him in Kentucky. They left my house after the Winston robbery. During that summer the parties that met at my house were Charley Ford, Dick Liddil, Clarence and Wood Hite and Jesse James. My son Frank was not there that summer. Have not seen Frank for seven years till I saw him at Independence. The last time before that I saw him was when Mr. Broome was sheriff of Clay county, and they came to my house and shot at him. Saw Jim Cummings that summer. His relations live three or four miles from my house. One of his sisters married Bill Ford, uncle of the Ford boys. Liddil and the Hites were often at my house that summer previous to the

Winston robbery. Did not know that summer where Frank James was. Thought he was dead. Am fifty-five years old. Was fifty years old when I lost my hand.

*Cross-examined.* Remember the wagon leaving. There were in it Jesse James, Charley Ford, Wood Hite and Dick Liddil. Jim Cummings was there in June. The party that left in the wagon took food and clothing, and a dress, apron and bonnet that I furnished, so they could pass off one of the gentlemen for a lady, so you couldn't catch them.

*Allen H. Palmer.* Live in Wichita county, Texas. Am a cattle man. Married Frank James' sister about thirteen years ago. Left home in May, 1881; returned about August 1, and found Frank James home with my family. Don't know what time he came there. Could not state how he was dressed at the time. Stayed at home but a few days, and left him there. When I got back he had gone. Next saw him yesterday.

*Cross-examined.* Frank James had a horse when I got to my place—a dark bay horse. Didn't ask him when he came or where from. Don't know any Clarence or Wood Hite, or Dick Liddil. The last time I saw Jesse was the year of the railroad strike (1877).

*Mrs. Allen H. Palmer.* Am the wife of last witness. Defendant is my brother; in the year 1881 saw the defendant at my house; he came there in June, in the first part of the month; he spoke of coming from Tennessee, and of having lived there. He stayed there till the first of July. He was gone and came back

again by the first of August, and was gone off and on till September. My husband came back the first of August. My brother was there at that time. Remember talking about him being anxious to have his friends negotiate his surrender to the Governor of Missouri. When he left Texas he started for California. Didn't then know where his wife was. Since then never heard of him until the surrender. While he was in Texas his health was not very good. Heard Frank speak of Jesse; that they got scared and left where they were living. Frank said he would like to have his friends negotiate his surrender, as he would like to be pardoned. Don't know anything about Jesse wanting to surrender. Never saw Dick Liddil till this week. Know nothing of Clarence or Wood Hite. Frank came to my house on horseback on a bay horse. He didn't tell me where he got the horse. If any one came he would go upstairs or out of the room. We lived in a remote part of the county where there are few visitors. He told me that he left Tennessee because Bill Ryan had been captured; that he got frightened; that his health was bad, and he came to my place to see if it would improve his health, and he wanted to try and negotiate with the governor for surrender.

*Bud Harbison.* Reside in Richmond. In coming from Richmond to the Harbison place, where Mrs. Bolton lived, the road passes right in front of my house. Was home and farming in 1881. Have frequently seen men passing my house on the road. Remember meeting a party

of two or four at the creek on the road. Never saw defendant until I saw him in the court house yard. Could not say that I recognized him as one of the many parties passing my house in the summer of 1881. Saw Dick Liddil or Mr. Anderson at Mrs. Bolton's in February, 1882.

*Cross-examined.* I couldn't identify any one of the four men whom I met at the creek on the road. Don't pretend to identify Dick Liddil as one of them. Did not recognize Wood Hite as one of them. Saw him after the exhumation of his body. He might have been stoop-shouldered. Had short whiskers and a little mustache, and would weigh 140 or 150 pounds. Don't know whether defendant is one of the men I saw at the creek or not. Was on the Wood Hite jury of inquest. If Mrs. Bolton said anything about Frank James I don't remember.

*Frank James (Sworn.)*

*Judge Philips.* Mr. James, you are the defendant in this case? Yes. Begin your statement of the history of this case, where the prosecution began, with the time of your departure from Missouri for Tennessee some years ago. Just state when that was? That was in the winter of 1876, if I remember it correctly. State where you went and where you stayed. Well sir, it is quite a route to follow it all round. I ranged across southeast Missouri directly into Tennessee, crossing the Mississippi river, think, perhaps about between the first and fifth of January, if I am not mistaken. State what time you arrived at Nashville. Didn't arrive at Nash-



ville until July, 1876. Went directly then from Nashville out into what is known as the White creek neighborhood. Rented a farm, which, however, I could not get possession of until January 1, 1878. Remained at Mrs. Ledbetter's during that fall. Put in a crop of wheat and moved there and lived in the place known as the Jesse Walton place one year, that was up to 1878. Next year I rented a place from Felix Smith, on White creek. Remained there a year, and made a crop in the meantime—a general crop, as farmers raise—corn, oats and wheat. The next year lived on what is known as the Jeff Hyde place, on Hyde's ferry, about three and a half miles from Nashville. Remained there a year. During that year didn't farm any. Was working for the Indiana Lumber company. That I think was in 1879. Was working in the woods, logging, as they term it, and I worked off and on all that summer at that business, driving a four mule team, and after that think it was in 1880, moved into Nashville. During that time, as it was very hard work logging, I got several strains and my health became impaired, and I found I would have to go at some other business. Thinking I could not stand working ten hours a day for three years as I had, I concluded to move into Nashville and go into some other business. During that time this gentleman who has been spoken of before, Mr. Ryan, was captured. Well, of course, I was apprehensive, and not knowing what sort of a man he was and only having a short acquaintance

with him, I concluded that perhaps for the sake of his liberty he would be willing to sacrifice my life. So I concluded to leave, and did so.

My first meeting with my brother Jesse was entirely accidental; was farming, as I stated, on the Walton place, and had gone into the store of B. S. Rhea & Son, and while I was sampling oats and talking to one of the clerks, Jesse James walked out of the office, came up to me and says: Why, how do you do? I spoke to him; didn't call any name of course. He was going by; he asked me where I was living, and I told him; he went out home with me, and told me he was living in Humphreys county, one hundred miles west of Nashville. He had been buying grain for this firm of B. S. Rhea & Son. That was in the spring of 1878.

The first time I met William Ryan, was in the fall or winter of 1879. Met him at my house. He had returned there with Jesse but his wife and children were boarding in Nashville at that time. The first time I met Dick Liddil in Tennessee was, in 1879. He and Jesse James came in together. Liddil was there off and on until that fall. He was making trips to and fro, but where I have no idea. Never saw Ryan, Jesse James and Liddil together any great deal in Nashville. When they were out of my sight my impression is they were together, but of course when they were out of my sight I could not state what became of them. When I left Nashville, in consequence of Ryan's arrest, my first

purpose was to protect my life so as to be able to support my family, and secondly to get shut of those parties who were around me. Had no control of things, and that was the reason I left there and went to Logan county, Kentucky, to George B. Hite's who had married a sister of my father's. As to the officers coming there, it was on a Sunday that it was reported they were at Adairsville, one and a half or two miles from the Hite's place, detectives looking for us, and they had followed us from Nashville.

That Sunday morning three men were noticed coming toward the house. Our lane ran for quite a distance south of the house past the farm, and there was a little lane came up directly to the house. Some one saw them coming from a distance and said: Yonder come three men. My brother, being a somewhat excitable man, said: No doubt those are the men that were in Adairsville. I said, I reckoned not; that I could not see what anybody could be following us for. Oh, yes, Dick says, you know Jesse and I borrowed a couple of horses, and I expect these men are from back down in Nashville. I said, I guess they won't come here. We went down stairs, and I said, Don't shoot anybody; for heaven's sake, don't kill anybody! I went into the parlor and looked out of the window to see if they came up the lane directly in front of the house. They didn't come, but went off. Thought perhaps it was some one going to church—neighbors, perhaps—so I went back up-stairs. However, the

men went on by, and Wood Hite followed them on a mule, and reported that they had gone in a round about way to Adairsville, and they were the same men we suspected of being detectives. Remained at Mrs. Hite's ten days or two weeks.

The Hite family was composed of George B. Hite, Mrs. Sarah Hite, her daughter Maud, old Mr. Norris and his wife. Wood Hite's name was Woodson Hite. He was between thirty-three and thirty-five years of age. His hair was light and his whiskers darker, rather dark sandy. He was a little stoop-shouldered, had a large, prominent nose and high forehead, and would weigh one hundred and fifty pounds. There was a striking family resemblance between us. My attention was first called to it the first time Dick Liddil and Jesse James came to our house. The next morning after breakfast Jesse looked at me and says, Why, Dick, he says, he looks like old Father Grimes. I said: Who is old Father Grimes? He says: He is your cousin, Wood Hite, and Dick laughed and said; Yes; he is. Clarence Hite was slender. You would call him a stripling, very loose in his movements, light complexioned, and, I believe, light-haired, with no whiskers at all. When I saw him in Kentucky he looked just like a green boy. From the Hite's we went to Nelson county, Kentucky. We first arrived at Richard Hoskin's, an old gentleman who lived in the 'knobs,' for it is a very broken country. There I separated from Jesse James and Dick Liddil, and can not tell where they went. Know a man

in Nelson county named Robert Hall.

Was not at his place in company with Dick Liddil and Jesse James. There was no agreement entered into between Jesse James, Dick Liddil and myself, or myself with any other parties, to go to Missouri for the purpose of robbing the express at the Kansas City ferry; but, I tried to persuade them not to come to Missouri. Jesse and Dick had been talking of coming to Missouri ever since we left Nashville. Liddil had left his wife here and seemed very anxious to get back. Am not certain who was his reputed wife, but believe it was Miss Mattie Collins. Told Jesse and Dick not to come to Missouri, because it would endanger the life of our mother. I said: You know already what has been done there. You know there is no protection for my mother and family in the state of Missouri, let alone for you, and I would never go there. My advice to Dick Liddil was to go to work somewhere and then he would have much more money at the end of the year than if he put in his time galloping around the country. But Jesse said they would go anyway. So I separated from them in Nelson county, Kentucky. Was not at Hall's in connection with Liddil and Jesse James. Remained there perhaps till the tenth or fifteenth of May, though I don't just remember the date. Then went to Louisville. Robert Hall took me in a buggy. From there I went to Texas. On the trip from Nashville to Hite's I rode a horse I got from Dick

Liddil in 1879. That is the horse he speaks of having sold me. Gave that horse to Mr. Hall for his services in driving me in a buggy to Louisville. From Louisville I went to Texas. Mrs. Palmer is my sister. Got to her house about the first of June, 1881. Remained there five or six weeks. After leaving my sister's I went into the Indian Nation. Got down in that country about the time I heard of the Winston robbery, then went to Denison.

Can not state whether I read of the Winston robbery in a paper or whether somebody told me. After that went back to my sister's in Clay county, and remained there through August and a part of September. As I returned on that trip heard of the Blue Cut robbery. When I left Tennessee gave my wife directions to go to Gen. Joe Shelby's, and see if there could be any arrangements made with the governor for my surrender. If I could have a fair and impartial trial accorded me I felt perfectly satisfied I could be cleared beyond a doubt. Didn't do much in Texas, as I felt the need of rest, for the three and a half years of hard work in Tennessee had told on my health, sat and read or lounged about the house. Returned to Kentucky. Received no answers in 1881 to my petition for leave to surrender. On my return my wife met me in Nelson county, in the latter part of October, 1881. We went to Chattanooga, then to Jonesboro, North Carolina, where I stopped at the McAdoo house. There was a little town called Salem, thirty or forty

miles from Jonesboro, at the foot of the mountains. That seemed to be a secluded place, and I thought I would go into business there, as I had experience in mill work, and there were any number of mills there, but the place seemed full of diptheria. So I went back to Jonesboro, and got my family and went to Raleigh, North Carolina. There wasn't a manufacturing establishment in it to amount to anything, saw that was no place to stop and went to Norfolk. Did not like that place, so my wife says, suppose we take a trip up the James river. I says, very well, all right. We went up the James River, and, arriving at Richmond, stopped at the Ford House. There I found the town all yellow-flagged for the small-pox, which scared me, as I didn't want to lose my wife and child. So we went to Lynchburg, which was a healthy place, and rented a house there. Was quite feeble all winter and very sick. Stayed there until about the tenth of May. While at Lynchburg, noticed the assassination of Jesse James. Was taking a New York Daily Herald at the time. Had been out walking and when I got back to the house I saw my wife was excited, and she came rushing to me with the paper and says; Jesse James is killed. I says, my God, where and how and who killed him? That was the third of April. After that I paid close attention to my papers. Remember reading in the New York Herald how Governor Crittenden, when asked what hope there was for Frank James, he replied, wherein as none of

his friends have never asked anything, I will not state anything about it. That gave me hope. I said to my wife, possibly if you return to Missouri and show a willingness on my part to let the past be buried, and that I am willing to surrender myself up, and be tried and meet every charge they can bring against me, I may have a fair and impartial trial. She went. Left Lynchburg, May 10, 1882, returning to Nelson county, Kentucky. Remained there until I effected my surrender, and came to Missouri, October 5, 1882. Was not in Missouri from 1876 to the time I passed through going from Texas to Kentucky.

Remember an interview with Frank O'Neill. Did not tell Mr. O'Neill that I had left the Smith place to become a wanderer again. Can't state how long ago I became acquainted with Dick Liddil. Had seen him before seeing him at Nashville. Had seen him at Hudspeth. Dick Liddil never came to Nashville with Jim Cummings. Did not regard the interval when I said to Mr. O'Neill that Jim Cummings and Dick Liddil came to Tennessee in the fall of 1880. Under my oath, I say Dick Liddil came there in July, 1879, and Cummings came in the fall. Can not remember when he left, exactly.

Went to Kentucky because I wanted to go there to see friends and to help in getting rid of these people. After getting into Kentucky I kept with them and went to Nelson county for the purpose then of keeping Jesse from going back to Mis-

souri, fully realizing the result would be what it has been, and to prevent another hand grenade raid on my mother's family and the children of the whole family.

Said to Mr. O'Neill that I was in Missouri in October, 1881. My answer meant that I was in Missouri passing through. Did not leave Ray county in October

of 1881 with Clarence Hite and separate from him at Independence.

When at Hite's I had pistols. Had no gun. I owned one. My wife had it. Told Mr. O'Neill that when I went armed, I carried two pistols and a Winchester, and I did so. When in Nelson county I had two pistols.

September, 1.

#### IN REBUTTAL.

*D. Brosius*, who was on the robbed train and who had declared the defendant to be not one of the men, was recalled, the purpose being to question him as to whether he had not at stated times and places told divers persons that the whole affair on the train occurred so quickly that he could not describe any of the men and didn't even know what they looked like. His answer to all these questions were in substance that he had always declared he couldn't give a description of the men as he could not now, and that being chaffed and joked with on all hands after the robbery he might have stated that the robbers were fifteen feet high and that they had revolvers four feet long.

*Boyd Dudley*. Am an attorney. Brosius told me just after the robbery that he saw but one man who was fifteen feet high, and that he thought that there were others.

*Cross-examined*. My office is with Circuit Attorney Hamilton, who is prosecuting the case.

*Wm. M. Bostaph*. On the morning after the robbery Brosius told me that he could not describe either of the robbers as

to their complexion or dress, but believed they had slouched hats pulled down over their faces.

*A. M. Irving*. Mr. Brosius told me the story about a robber fifteen feet high.

*Eli Dennis*. Brosius told me the robbery was so quick and there was so much confusion that he could not describe the robbers or tell anything about them.

*W. D. Gillihan*. After Frank James was brought to Gallatin, Brosius told me that he could not say whether the prisoner was one of the robbers or not.

*George Tuggle, R. L. Tomlin and T. B. Yates*. All testified to Brosius' story about robbers fifteen feet high and revolvers four feet long.

*Mrs. Sarah E. Hite* (recalled). Knew Wood Hite since 1878, and was in the same house with him about four years. He was very untidy in his toilet, and not at all literary in his tastes. Frank was always neat, and he and Wood did not resemble each other.

*Cross-examined*. Wood Hite's forehead was not high, nor were his ears large. In the spring 1881, Jim Cummings and Frank James were not on friendly

terms. Jesse came to the house one morning to kill Jim Cummings. He seemed much excited, and said he was going to kill Jim Cummings. Jim was at the Hite place alone in February, 1881, and was not there since. Don't know whether they became friendly or not after that.

*Silas Norris.* Knew Wood Hite four or five years, and that he did not to any general extent resemble Frank James, being somewhat smaller. He would take Frank to be six feet high. Never noticed any striking resemblance between the two men, though never saw Frank James but once before coming here.

*Major J. H. McGee.* Was in the smoking-car on the train that was robbed at Winston. Sat close by the conductor when he was shot. There were three strange men in the car when the conductor was killed.

Two of three men were engaged in shooting, and one was engaged in cutting the bell-rope. Saw two of them come in at the front door of the car, but did not see where the third came from.

*Cross-examined.* Heard pistols and heard the exclamation, "down! down! down!" Saw one man standing near me at the middle of the car with pistols, and one near the conductor, both shooting. The conductor pulled the bell-rope, and then one of the men cut it. Saw all three of the men and sized them up, but I couldn't tell whether defendant was one of them or not. Saw no pistol in the hand of the man who cut the rope, nor did I see him doing anything else after shooting Westfall. The man who shot him walked with the other two to the front end, and going out on the platform shut the door and I saw no more of them.

*September. 3.*

## INSTRUCTIONS TO THE JURY.

**JUDGE GOODMAN.** The court instructs the jury on behalf of the state as follows:

First—If the jury believe from the evidence that defendant Frank James, in the month of July, 1881, at the county of Daviess, in the state of Missouri, willfully, deliberately, premeditatedly, and of his malice aforethought shot and killed one Frank McMillan; or if the jury find that any other person then and there willfully, deliberately, premeditatedly, and of his malice aforethought, shot and killed said Frank McMillan, and that defendant Frank James was present, and then and there willfully, premeditatedly and deliberately and of his malice aforethought aided, abetted or counseled such other person in so shooting and killing the said Frank McMillan, then the jury ought to find the defendant guilty of murder in the first degree.

Second—The term willfully, as used in these instructions, means

intentionally, that is, not accidentally. Deliberately means done in a cool state of the blood, not in a sudden passion, engendered by a lawful or some just cause of provocation, and the court instructs you that in this case there is no evidence tending to show passion or provocation. Premeditately means thought of beforehand any length of time however short. Malice does not mean spite or ill will as understood in ordinary language, but it is used here to denote a condition of mind evidenced by the intentional doing of a wrongful act liable to endanger human life; it signifies such a state of mind or disposition as shows a heart regardless of social duty and fatally bent on mischief. Malice aforethought means malice with premeditation as before defined.

Third—If the jury believe from the evidence that the defendant, Frank James, with Jesse James, Wood Hite and Clarence Hite, or with any of them, and others at the county of Daviess, in the state of Missouri, in the month of July, 1881, made an assault upon one Charles Murray, and any money of any value then in the custody or under the care of said Murray by force and violence to the person of said Charles Murray, or by putting said Charles Murray in fear of some immediate injury to his person, did rob, steal, take and carry away; and if the jury also believe from the evidence that the defendant, Frank James, in the perpetration of such robbery with malice aforethought as before defined, willfully shot and killed Frank McMillan, then the jury ought to find the defendant guilty of murder in the first degree.

Fourth—If you find from the evidence that the defendant, Frank James, at the county of Daviess, in the state of Missouri, in the month of July, 1881, shot and killed Frank McMillan, and that such act was done neither with the specific intent on the part of the defendant to kill any particular person, nor in the perpetration of a robbery, yet if you further find that defendant was then and there recklessly, intentionally and with malice, firing with a deadly weapon, to wit, a pistol, into or through certain cars of a railway train containing a number of passengers and those in charge thereof, and while thus firing, said McMillan being on said train, was shot and killed by defendant, then you will find defendant guilty of murder in the second degree; or should you find from the evidence that at said time and place said McMillan was shot and killed by any person or persons whomsoever, and that such act was done neither with the specific intent on the part of such person or persons to kill any particular person, nor in the perpetration of a robbery. Yet, if you further find that such person or persons were then and there recklessly, intentionally and with malice, firing with a deadly weapon or weapons, to wit, a pistol or pistols, into or through certain cars containing a number of passengers and those in charge thereof, and that while thus firing said Frank McMillan, being on said train, was shot and killed by such other or others, and that defendant was present, then and there recklessly, intentionally

and with malice, aiding, abetting, assisting and counseling such other or others to fire into or through said cars, then you will find defendant guilty of murder in the second degree.

Fifth—The jury are instructed that by the statutes of this state the defendant is a competent witness in his own behalf, but the fact that he is a witness testifying in his own behalf, may be considered by the jury in determining the credibility of his testimony.

Sixth—The jury are further instructed that to the jury exclusively belongs the duty of weighing the evidence and determining the credibility of the witnesses; with that the court has absolutely nothing to do. The degree of credit due to a witness should be determined by his character and conduct; by his manner upon the stand; his relations to the controversy and to the parties, his hopes and his fears; his bias or impartiality; the reasonableness or otherwise of the statements he makes, the strength or weakness of his recollections viewed in the light of all the other testimony, facts and circumstances in the case.

Seventh—In considering what the defendant has said after the fatal shooting, and previous to the time of his testifying in this case, and with reference to any material matter in issue, the jury must consider it all together. The defendant is entitled to the benefit of what he said for himself, if true, as the state is to anything he said against himself in any conversation proved by the state. What he said against himself in any conversation the law presumes to be true because against himself, but what he said for himself the jury are not bound to believe because said in a conversation proved by the state; they may believe or disbelieve it as it is shown to be true or false by all the evidence in the case.

Eighth—The jury are instructed that the testimony of an accomplice in the crime for which the defendant is charged is admissible in evidence, and the degree of credit to be given to the testimony of such accomplice is a matter exclusively for the jury to determine. The jury may convict on the testimony of an accomplice without any corroboration of his statements, but the testimony of such accomplice as to matters material to the issue, if not corroborated by facts and circumstances in proof should be received by the jury with great caution.

Ninth—If the jury entertain a reasonable doubt as to the defendant's guilt, they should find him not guilty, but to authorize an acquittal on the ground of doubt alone, such doubt must be real and substantial, and not that there is a mere possibility that the defendant may be innocent.

Tenth—If the jury find the defendant guilty of murder in the first degree, they will simply so state in their verdict, and leave the punishment to be fixed by the court.

If they find the defendant guilty of murder in the second degree, they will so state in their verdict, and will also assess punishment



at imprisonment in the penitentiary, for such term not less than ten years, as the jury may believe proper under the evidence.

For the defense the jury is instructed:

First—The defendant is on trial for the killing of one James McMillan, and for no other offense. To authorize the jury to find him guilty under the first count of the indictment, the jury must find from the evidence that defendant, Frank James, shot and killed the said McMillan; and if the jury entertain a reasonable doubt of the defendant's doing the specific act of said killing, they must acquit him under the first count of the indictment.

Second—The court instructs the jury that under the second count of the indictment the defendant is charged with making an assault in connection with others upon one Charles Murray, and robbing him of certain money, the property of said Murray, and that in perpetration thereof they shot and killed one Frank McMillan. Before the jury can find the defendant guilty under this count they must find and be satisfied beyond a reasonable doubt from the evidence that the defendant made such felonious assault on said Murray and stole from him money as charged in the indictment, and also that in the perpetration of said felony he shot and killed McMillan, or that the defendant acting in connection with one or more of the parties named in the indictment was present aiding, counseling and abetting them in committing said assault and robbery; and that some one or more of said other persons so named in the indictment did shoot and kill said McMillan, and that said killing was so done in the prosecution of said felony.

Third—It is not sufficient to authorize you to find the defendant guilty under the second count of the indictment, that you should believe that the defendant was present at the time and place of the alleged homicide and felony, and that he had gone there with others for the purpose of robbing the said Murray, or that one Frank McMillan was then and there killed by some one of the party engaged in the robbery of said Murray. But you must be satisfied beyond a reasonable doubt either that the defendant himself shot and killed said McMillan or that some one of the party with whom he was acting, as alleged in the indictment, and in the prosecution of the purpose for which the party was assembled, shot and killed said McMillan. If, therefore, the jury should believe from the evidence that some one of said party so engaged in the alleged attack and robbery, aside from and independent of the common design and not in the prosecution of the purpose for which the party assembled, or after robbery of the said Murray was committed, shot and killed said McMillan of his own motive, without the concurrence of defendant, then the defendant can not be convicted under the second count of the indictment, and the jury in such case must return a verdict of not guilty as to the second count.

Fourth—The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses who have testified therein; and if the jury believe that any witness has willfully sworn falsely to any material fact they are at liberty to discard and disregard the testimony of such witness. And in determining the credibility of any witness the jury may take into consideration his or her moral character as disclosed by the evidence developed on the trial; and if, on account of his or her moral turpitude or criminal acts, if any, the jury regard him or her as untrustworthy of belief and credit, they are at liberty to disregard and reject the whole of such testimony, although a part of his other testimony may be corroborated by other evidence in the case.

Fifth—Whilst the law admits as a competent witness for the state one who confesses that he was engaged in the crime charged and an accomplice therein, yet the jury should receive his statements with great caution and circumspection, unless corroborated by other testimony, and corroborative testimony should be, as to material facts, tending to show defendant's presence at and participation in the homicide.

Sixth—The burden of proof is on the State, and defendant is presumed innocent until proven guilty beyond a reasonable doubt.

Seventh—In order to justify the inference of legal guilt from circumstantial evidence alone, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

#### THE SPEECHES TO THE JURY.

*Mr. Hamilton* began by expressing his unbounded confidence in the character and integrity of the jury and his belief that their verdict would be an acceptable expression of the sense of the community in connection with this crime. He discussed briefly train robbery as a new and ingenious crime which owed its invention to Missourians. He recalled the night when the news flashed over the country that a train had been robbed and two innocent men were killed within a few miles of Gallatin, and reminded the jury how every honest man was filled with indignation at this insult to the law and disgrace to the country. He stoutly denied that the state had used any extraordinary or unfair means to make a case against the defendant. He said that Dick Liddil's testimony, with that of two corroborating witnesses, was of itself abundantly sufficient to convict, but that independent of that man's testimony the state had made out a case. He held

that the admitted association of these men in Tennessee and Kentucky, the shipping of the box of guns to the rendezvous of the gang in Missouri, and the absolute and unimpeached proof that the defendant was one of the men in the vicinity of Winston on the day of the robbery were facts of themselves sufficient to convict. The fact that Liddil was a horse-thief was not the fault of the defendant. He chose his own companions and if one of these companions was a horse-thief and afterward proved an informer the defendant was simply unfortunate in his choice. The men who corroborated Liddil, he said, were respectable citizens, who could have no motive in sacrificing the life of an innocent man. As far as any part the railroad company had taken in aiding the prosecution, he held that a corporation, as well as a citizen, should aid in hunting down and bringing to punishment any miscreant who perpetrated a crime against it. It was a duty the road owed to the traveling public and to the shippers of treasure.

*Mr. Hamilton* discussed each of the witnesses for the state and their evidence, holding that whatever the character of some of the witnesses the corroborative evidence proved that in this particular case they confined themselves to truth. The alibi had utterly failed—first, because of the manner that characterized the testimony supporting it, and next because of the fact that, even admitting the statements of Mrs. Palmer and Mr. Palmer, the Texas witnesses, to be true, it was not inconsistent with the guilt of the defendant, as Mrs. Palmer's statement showed that Frank James was absent from her house for three weeks, covering the exact period of the robbery. As to the assassination of Dave Poole and the outrageous raid on Mrs. Samuel's house with a hand grenade, those facts had nothing to do with this case, and a reference to them was a begging of the question.

*Mr. Glover* said that, according to the custom of the country, he felt impelled to thank the jury for the close attention given the case, the court for the consideration shown counsel and the state's counsel for the graceful extension of time proposed by them. He also desired to thank Mr. Wallace for

having for one moment admitted that the defendant was entitled to a presumption of innocence until proven guilty. Briefly reviewing the list of forty-seven witnesses he stated that he would devote his time mainly to those witnesses whose testimony was relied upon to establish the identity of defendant as a party to the robbery, as upon this point, in his opinion, the case turned. The theory of his argument was, in the first place, that Frank James, having lived four years of correct life in Nashville, there was every incentive for him to continue in that course, and none for him to join the men who followed him to his home, and through whose proximity came the necessity for abandoning that home. In the next place, Dick Liddil, having his life and liberty to save, had the very strongest incentive to do that which would win for him the approbation of the prosecuting officers, namely to furnish the evidence needed on which to convict Frank James. Following this theory he took up the testimony to show that the men who robbed the train were but four in number, and that Liddil had in his story increased them to five in order to make room for dragging in the man whom the state officers were most anxious to convict. He showed that Penn, the first state's witness, testified that there were three men in the smoking car, while Mr. Brosius testified that there were but two, and Mr. McGee testified that although there were three, one of them had no pistols, and simply cut the bell rope. He argued that it was utterly improbable that if that third man was a robber he should be in the car with no pistols in his hand, and showed how easily Mr. McGee might have mistaken the motion of jerking the bell by the brakeman or conductor for the motion of cutting the rope by one of the robbers. The bell was certainly rung at that juncture. He next showed how the men went out on the front platform and who, according to the evidence of Penn, the only witness who pretended to say who stepped on the platform to shoot back through the car, was the stout man who had killed the conductor, so that if there was any evidence showing who killed McMillan, that evidence pointed directly to Jesse James. Meantime, the train had stopped and there was ample time for the man or

men who were in the smoker to run forward to the baggage-car. The stopping of the train caused the baggageman to open the door and he was pulled out onto the ground. The expressman stated that he immediately hid behind a trunk, and while he was there some one ran through the car. This was unquestionably one of the men who went forward to the back of the tender to intimidate the engineer. For up to this time the engineer had seen no robbers at all. Again, the baggageman, being pulled out, one of the men, Wood Hite, stood guard over him till he broke away and got on the train, and that man was left when the train started again, and took no further part in the robbery. This reduced the number of robbers. A couple of miles further on the train stopped, and, according to the state's own witness, three men, and only three left it. Three and one make four, and not five. In all the mountain of evidence submitted there was not one witness who ever saw more than four of these men. Liddil's statement had been framed to explain this discrepancy in all the preliminary trips by a representation that each time one man went by the train, while the others rode on horseback. Once it was Wood Hite who went by train and again Clarence Hite; there was nothing to show why one should go by train, or where he went from or to; but he had to account for a fifth man, somehow, to make his story good, and hence the train was made to assist, until the Winston robbery, when there was no pretense that anybody went by train. As a matter of fact, it was very clear that the first two trips described by Liddil were not for robbery at all. On these trips the men, of whom there is account of only four, although he said there were five, made no effort at concealment—slept and ate always at roadside houses, etc. On the robbery trip, however, they fell into no such indiscretions, but slept in the woods, and ate sometimes nothing for a day, rather than expose themselves.

Proceeding to the question of identification, as a specimen of the unreliability of the evidence of the kind offered, while Liddil testified he was at Mrs. Kindig's house for dinner on the second trip, Mrs. Kindig testified that she gave him din-

ner on the day before the robbery, or two weeks after he said he was there. Each of the identifying witnesses contradicted each other in their descriptions of the defendant, and they were also contradicted by the evidence offered by the state. Not one of the identifying witnesses had identified him by the most conspicuous mark on his face, a sabre cut across the left side of the brow, which nobody could fail to notice that spoke to him for a moment. The conclusion was that the people who thought they saw Frank James saw in reality Wood Hite, who bore a most remarkable resemblance to defendant in all of his prominent features.

*Mr. Glover* closed by referring to the testimony of the mother and half brother, cousin and brother-in-law of the defendant as to his absence, to the previous statements of Liddil and the Boltons to the same effect, and to the testimony of the sister and brother-in-law of Frank James as to his Texas trip, saying that had this last testimony been manufactured, it would have been a matter of no difficulty at all to have made his Texas visit to their home cover the entire period of the robbery, as it did not do.\*

*Mr. Garner* in his speech treated the case generally and he made no attempt at an analysis of the evidence. He indulged in a very able diatribe against Liddil. He contrasted the statement of Liddil to Governor Crittenden acquitting Frank James of any murderous intent or part in the Winston robbery with his testimony on the present occasion, wherein he made the defendant confess to a cold-blooded murder; and he contrasted Mrs. Bolton's sworn statement before a coroner's jury, to the effect that Frank James had not been in this region for two years, with the statement made on the stand wherein she made Frank one of the Winston gang. He dwelt at length on Frank James' surrender conditioned only on a

\* During the recess Judge Harber, a prominent citizen of Trenton, informed the counsel for the prosecution that Mr. Glover's theory as to the cutting of the bell rope was correct, as a brakeman named Frank Coles had informed him that he (Coles) broke the bell rope himself in his efforts to stop the train, as he was fearful that if the train went on it would run into an ambush.—*St. Louis Republican*. Sept. 4, 1883.

fair trial as a thing that could never have occurred if he had been a party to the Winston affair, and if he had been so utterly indiscreet as the state's case would make it appear. He called attention to the fact that it had been indisputably proven that just prior to the robbery, at a time when Frank James was in Texas, and full a month after his alleged return to the gang, Mrs. James went to the house of General Shelby in order to inaugurate negotiations for her husband's surrender, a step that would never have been taken were another robbery in contemplation.

*September 4.*

*Mr. Hicklin* said he had no apologies to offer for Dick Liddil or the Fords or the Boltons. Dick Liddil was a confessed highwayman and horse-thief and the Fords and Boltons were harborers of highwaymen and horse-thiefs. The state was under the necessity, where the only persons having knowledge of a crime were of this class, of using informers as state's evidence witnesses as they had been used as far back as the history of courts ran. He confessed that the Fords and Boltons had been successfully impeached, and it had been shown that they had made statements before coming upon the stand that differed very materially from their testimony. He held, however, that the safe course would be to consider the motives that actuated each of these statements, and that being considered he had no fears for the result.

He devoted a large part of his argument to the demolition of the alibi, his strongest point being that Frank James, according to his own testimony, took no pains to conceal himself or to avoid observation while in Tennessee and Kentucky, but as soon as he got into the remote region of the Texas cow-boys he became a recluse, and took such pains to keep people of that far-off land from seeing him that he could not name a single party he saw in that alleged trip of several thousand miles. Yet as soon as he returned from this alleged trip in Texas he showed himself in public as before, traveled openly with his family, and registered wherever he went. Out of all this came the improbability of the correctness of the alibi theory.

*Mr. Slover* went into the testimony in careful detail, showing, that no two of the identifying witnesses agreed in their description of Frank James at the time of the robbery, some giving him short burnsides, some long burnsides, some full beard, some no beard at all, some light whiskers, some dark whiskers, some light clothes and some black clothes. Not one of them had noted the defendant's prominent ears or scarred forehead, and from all this he argued the utter unreliability of any statement from these sources going to positively identify the defendant with one of the robbers. Many of the witnesses described "side-burn" whiskers, and others "burnsides," and these were utterly different styles under the nomenclature of this region. He devoted a deal of time to an elaboration of the theory that there were but four men in the train robbery, and not five, as stated by Liddil.

JUDGE PHILIPS FOR THE PRISONER

*Judge Philips.* May it please the court, and you gentlemen of the jury: In view of the malign criticism of certain newspapers in the state as to the propriety of my appearing as of counsel in this case, it is not improper, in justice to truth and my position as a member of the Supreme Court Commission, that I should detain you for a few moments in explanation. There is nothing in the constitution of this state to prevent me from appearing here as counsel. There is nothing in the act creating the commission to render it unlawful or improper. Long before the commission was created, or I had any expectation of connection with it, and long before the prisoner at the bar had surrendered to the governor of the state, he applied to me, through a mutual friend, to know whether, if he should come in and throw himself upon the country, I would undertake his defense and aid in according to him the constitutional privilege of a fair and impartial trial before the courts. He was distinct and candid in the statement that he had not a dollar in the world to offer me. Upon me he had no claims, other than those which spring from the bonds of human sympathy and



that charity—the one touch of which makes all the world kin.

In that fierce, internecine strife, which swept the land like a tornado, dividing families, arraying father against son and brother against brother, in deadliest contention, Frank James and I stood in mortal antagonism. It was my fortune to see his flag go down in desperate defeat, while mine went up in permanent triumph. I was victor, he was the vanquished.

Whatever others may say or think, the idea I had and have of the episode of the James brothers was that it came as the bitter fruit of that dire strife. And when, from the summit of peace on which we stand today, we look back over the trampled fields yet marked with the red hot ploughshare of war, and recall the history of civil wars, reciting how slowly nations recover from the blight—how long it takes the ghastly wounds in the body politic to heal, I affirm surprise at the rapidity of our recovery. And when I recall all the local bitterness of that day, with its crimination and recrimination, its reprisals and outrages, peculiar to neither side in Missouri, with the bad blood it engendered, and today behold the magnificent picture of a civilized state, reposing in peace, exulting in plenty, and marching on to higher achievements in the arts of peace and social order, my heart swells with pride and gratitude to the God of our deliverance.

And when I saw the so-called James gang—the last remnant in the state of unreconciled and unaccepted parties to the local predatory struggle, suing for reconciliation—offering to throw themselves on the justice of the law and the mercy of the Commonwealth, asking nothing but fair treatment—with but one aspiration and one hope, to devote, if allowed, the remainder of their lives and energies to the duties of a husband, father and good citizenship, my whole heart went out in congratulation to the good people of the state.

To the prisoner, his wife and their little boy, I had but one

response to make to their personal appeal to me. No man, no creature made in the image of God, could appeal to me for words of justice, for one throb of sympathy, under such conditions, without my heart beating a little warmly for him and his.

As cowardly and mean as the miserable fellows are, who are traducing me for this act of chivalry and grace, I would ask mercy for them, if not justice—should they come to contrition, especially if they had wife and child, with piteous eyes beaming on me, pleading for the life of the man they love.

It was in response to that overture, and to this sentiment, that I consented to defend this man. On my promise to defend him he came from his hiding and handed his pistol to the governor of the state. To keep that promise I am here. What brave man, with any nobility in his soul, will deny the rectitude, the honor of my action?

I am not here as commissioner, with the judicial ermine around me. I am here as a licensed attorney of this commonwealth, standing on the commission of my manhood, trusting to nothing to rescue this prisoner save the law and the evidence, as I am able to understand and expound them to court and jury.

Gentlemen of the jury, common fame has invested this defendant with unmerited notoriety—giving to his life much of romance. How much of truth and how much of fiction there is in it all you and I know not in this trial. Under the broad shield of the constitution of the state he stands before you in this court room as any other citizen. The bond of your oath is that you know him only as the evidence shows him to be. You are to take him where the evidence finds him, and leave him where it places him.

Public rumor is often a false and a foul thing. It has had Frank James identified with every outrage and bold robbery committed between the mountains of West Virginia and the Ozarks of Arkansas and Missouri within the last six years. During these years rumor has placed him simultaneously in

the counties of Clay, Jackson, Lafayette, in this state and elsewhere, wherever daring exploit in outlawry startled the country.

But what does the state's own testimony disclose? In 1876 he left this state, with all his earthly possessions—a two-horse wagon and his young wife—and went to the state of Tennessee. Everything about that movement indicated what? To my mind this is impressively significant. The miseries and ghosts of the war hung around his footsteps in Missouri. Weary and heartsick of it all he determined to turn his back upon it, and seek a new home, under an assumed name, in the hope that he might find a new life of peace in humble, honest industry. He had just taken to his bosom and confidence a young, trusting sweet woman. That of itself was highest proof that he was not seeking longer adventure, but that pleasure and happiness which come surest from domestic life and retirement.

I confess myself surprised at the developments of this piece of evidence, touching upon the life and conduct of this man during the years that followed his removal to Tennessee. It strengthens my faith in him. True it is that Jesse James accompanied him from Missouri. But in southeast Missouri they separated, like Abraham and Lot of old, one taking to the right and the other to the left, each pursuing his own course. Frank went to Nashville, not to maraud, not in quest of a new theatre of adventure. He went upon a little farm, and there he toiled, struggled and plead with the generous earth for bread and sustenance. The evidence declares that from early morn of Monday to nightfall on Saturday, week after week, year after year, he delved, drove teams, hauled logs, for one dollar and a half per day; and for nearly five years he was not further from his little home than the nearest trading village or town. Respected and much liked by all his neighbors he ate his bread in peace.

There, too, the first born of happy marriage came to gladden and lend a new charm to that humble home.

As he has said to me, those were the happiest days of his

life. His bread was sweet, because it was labor's reward. It was wet with no tears, and cankered by no cares, because it was planted in peace, watered with heaven's dews, and gathered with the hands hardened with honest toil.

There is not on this jury a man who can believe that from the spring of 1876 to the time of the decampment in the spring of 1881 Frank James was engaged in any marauding expedition, or any violation of law, because both the state's testimony and that of the defense establish his constant presence at home in unremittent farm labor.

But where, during all those years of peaceful and honest living by the defendant, was that pink of a witness—Dick Liddil—whom the state has presented as its chief reliance to convict this man? He himself admits that in 1879, when there is no pretense that James was in the state, or in confederation with any band, he voluntarily tendered his eminent services as an accomplished thief, cut-purse and cut-throat, too, what Mr. Wallace is pleased to dub, the gang. Where was this? Not in Tennessee, but in Mr. Wallace's own county here in Missouri. Who were that gang? Jesse James, Jim Cummings and Ed Miller. I do not know that all that has been imputed to them is true; but if it be true that Dick Liddil was hail fellow with them, the crowd was not suited to run a prayer meeting or found a moral colony. What was Dick Liddil doing there in 1879? I asked him if he was not in the Glendale robbery, he declined to answer because it would criminate him. Shortly after that he appeared in Tennessee. He was a bad immigrant. It was the unhappiest day for Frank James in many years, when this slimy serpent of evil came crawling around him. Taking advantage of an acquaintanceship relating back to boyhood almost, and of his knowledge of Frank James, incognita, he gained admission to his fireside and humble hospitality. Frank was in no condition to peach on any of these men. He could do so only by disclosing his identity, and rendering further flight, with his wife and babe, a necessity. What was Dick doing? He had found Jesse James, and was

marauding in Kentucky and Tennessee. He was merely keeping his hand in, by now and then plucking horses from the racks where the owners had hitched them, or gently persuading some belated traveler that he could get along best afoot or unburdened of his cash and watch. He himself, so willing to swear anything to help Mr. Wallace convict, does not pretend that Frank James had anything whatever to do with the Tennessee and Kentucky exploits.

In the progress of this discussion we now come to the Bill Ryan episode, which seems to be the rallying point for the state's theory that the defendant was in combination with the gang. Bill Ryan was hanging around Nashville with Dick Liddil. Ryan got into some trouble and was arrested. On his person was found a large sum of money, and a portable arsenal. He was jailed; and immediately thereafter Frank James broke up his home, and he and family disappeared.

Gentlemen of the jury, the best test for understanding the conduct of others is, often, to put yourself in their places. Surround yourself by the same circumstances which environed Frank James—a man hunted and outlawed—whose name the public press of the country had for years associated with that of Jesse James, Cummings, Ryan and Liddil, to whom was attributed every daring robbery and outrage from the North of Kentucky to the valley of the Arkansas river.

When, therefore, Ryan, in a drunken debauch, fell into the law's grasp, under circumstances of such dark suspicion, his identity was liable to be discovered, as the sequel proved, and lead to the discovery of the covert of the defendant. The instinct of self preservation is predominant in the average man; and the defendant, with quick apprehension, surmised, that to save himself, Ryan might give up his (James') secret. What was he to do? Ryan's confederates were stampeded; and the dernier resort was forced upon the defendant to break his household idols, turn away from his little home, his wife and boy, to seek safety in a common retreat with those with whom he dared not break just then.

The state's counsel have sought to make capital out of the fact that James retired with the gang, while he now claims that he wished to rid himself of them. His first care was that of loyalty to his little family. His wife and child he sent, heavy hearted, to her friends in Missouri. Where should or where could he go? Where more likely would the outcast and the homeless man, hunted and watched, turn his eyes than to the door of his nearest kindred? He went with the others to his aunt's—Mrs. Hite. She and her children of all others he had a right to believe had a place of welcome and refuge for him in the hour of extremity. Thither they went. After they left there we have but two witnesses testifying here as to what occurred in Kentucky, where the Hites lived.

Dick Liddil says they agreed to return to Missouri for pillage and plunder. On the other hand Frank James says that Jesse proposed to return to Missouri, and against that proposition he entered his solemn and earnest protest. Why not believe his story in preference to Dick Liddil? Is it not the more rational? It is corroborated by many facts and circumstances in evidence. The defendant says he told his brother they must not go to Missouri, as God knew their dear old mother had already suffered enough on their account. He called up the picture of the sorrow and desolation hitherto wrought in her home, how she had lost her arm by Pinkerton's detectives throwing hand grenades into her room, and also killing her little child and their brother; that their presence in the state would subject her to espionage and additional insult, if not injury and outrage. How natural was this argument and appeal? But Jesse was heady and desperate. On that rock they split.

There is another confirmatory fact, favoring the defendant's story. He sent his wife to her father in Jackson county, Missouri. The family sewing machine was forwarded by express to Page City, Missouri, in care, perhaps, of General Shelby.

Mr. Wallace has discovered a real Trojan horse in this

much traveled sewing machine. All that was left to the fugitive, panting, little wife of Frank James was her babe and the family sewing machine. Wallace has run that machine down with the whole detective force of two railroads, and all the express companies, between Kentucky and Kansas. There is nothing in history or fiction comparable to this discovery of the efficient prosecuting attorney of Jackson county, unless it be the cabalistic letters on the curious stone discovered by Pickwick.

I am now satisfied that the extraordinary effort put forth by Mr. Wallace to run down this sewing machine was to use this remarkable piece of evidence as a substitute for Dick Liddil's testimony, in the event the court should exclude Dick as an incompetent witness, he being a convicted thief.

But to the argument. When Mrs. James reached Page City she told General Shelby she had come to him from her husband to request his intercession with the governor of the state to permit her husband to return to Missouri, under assurance of the protection of the law. General Shelby testified that was her mission. So, you have the absurd, improbable theory of the state, that while the husband was preparing a raid of brigandage upon the state he was employing his wife as a diplomatic agent to negotiate for his surrender to the chief magistrate of the state.

Counsel for the state will suggest that that was a mere ruse—that the defendant was employing his wife as a decoy duck to throw the officers off the trail. If, gentlemen of the jury, you are to drink in the suspicious, vindictive spirit of the private, hired counsel in this case, instead of the spirit of the law, which commands you to judge mercifully—if you are to smother reason under a load of suspicion, instead of heeding his Honor's instructions from the bench—to give the prisoner the benefit of every reasonable doubt—this trial, under the forms of law, will be a mockery, and I would have no duty to perform here. But, you are a Christian jury in a Christian land, respecting your oaths and obeying

yourselves the law; and, therefore, you will judge this man as you would be judged under like circumstances.

Mrs. James' mission to General Shelby was genuine. Shelby's testimony is worthy of all credit. It is but frank in me to admit that the General's deportment on the witness stand was improper, as a matter of propriety. It hurt no one so much as himself, and I know he regrets it. But he spoke truth. His high character needs no defense and no eulogy by me. His name is a household word in Missouri. As splendid in courage as he is big of heart, his home is the model for hospitality. No man however poor or outcast was ever turned from it hungry. Truth and chivalry to him are as modesty to the true woman, and azure to the sky.

He has been denounced in public and in private as a friend of Frank James. Smirking Puritans and lugubrious Pharisees have shrugged their shoulders at the fact of Shelby giving a bed and a glass of water and a pinch of salt to the defendant when he chanced to pass his door; and for extending the hand of assistance and a word of sympathy to Frank James' wandering heart-sick wife. In the midst of so much moral cowardice and starveling charity in this age. I rather admire the quality of heart which prompted Shelby. It was not the promptings of a spirit of disloyalty to law and society, but it was the quick response of a brave and generous heart to that sentiment which makes us humane instead of savage.

There are ties betwixt these men which were formed back in war times, when they stood elbow to elbow upon the perilous edge of battle. They had marched, tented and fought side by side. Who would dissolve the bonds of fellowship born of such comradeship? It was natural for the defendant, in his extremity, to turn toward such a man as Shelby. He knew Shelby would give audience and heed to the supplications of a woman—the wife of an old comrade. The mistake Shelby made was in not going to the governor, and attempting to carry out James' wishes. But other efforts, Shelby states, in that direction had failed. So he told



Mrs. James it was useless to renew the attempt. Public temper was averse. So with heavy heart the little woman had the infernal sewing machine reshipped to her father at Independence, Missouri; while she gathered her little boy closer to her bosom, and after a brief visit to her father, took up her long weary march to the Pacific slope, trusting to the deliverance of time and Providence.

There are other facts in evidence confirmatory of defendant's story, that he broke from the gang and went south. When Jesse James and Dick Liddil appeared at Mrs. Samuel's—mother of the defendant—she met them at the door and her first inquiry was: Where is Buck (her pet name for Frank)? Frank was a delicate boy, and the mother's anxious heart told her he was dead. She had not heard from him for so long a time. Both Jesse and Liddil told her he had gone south. Her solicitude for Frank's welfare and safety made her press the inquiry, whereat Liddil assured her that Frank was not with them—he had gone south. If Mrs. Samuels and John Samuels are to be discredited in this statement because of their relationship to the prisoner, what, Gentlemen of the jury, are you to say to the testimony of Frank Tutt, Crowder, Childs, and Shelby, wholly disinterested witnesses, of unimpeachable character? Liddil told them, when he was without any reasonable, or conceivable, motive to lie, both before and after his surrender, that he had not seen Frank James—that he was not in the Winston robbery—that he (Frank) and Jesse had quarreled and separated. Superadded to all this, look at the testimony of the throng of most reputable witnesses from Ray county, who told you what Mrs. Bolton—the State's important witness—over and again declared to them that Frank James was not at the Winston robbery—that he had been trying for years to earn an honest living, and the other parties would follow him up and try to get him into trouble; and he would move away from them to escape the detectives—and that she had not seen him for years, although Jesse, Liddil and others of the gang were at her house about the time of this

robbery. Now where did she get this story but from Dick Liddil and the rest of the party?

We are next, in historical order, brought to Missouri in the spring of 1881, prior to the Winston robbery. The identification of Frank James, as one of the participants in the alleged homicide of McMillan, depends mainly upon the testimony of Dick Liddil. The learned counsel for the state, who have preceded me in argument, have warned you that I would abuse poor Dick Liddil. If I did not, in this respect, meet their expectation it would be because of the injunction that we ought not to kick a dead dog. For he is so morally dead that like Lazarus he stinketh in the nostrils of every honest man. If ever there stood a creature in a court of justice as a witness who has justly called down upon him the imprecations and loathings of every manly heart it is this witness. There is nothing—absolutely nothing—in and about the fellow to excite one emotion of pity, sympathy or respect. We are just as the good God has made us. We are endowed with certain instincts and sentiments which we would not resist if we could. The world over the brave and the true despise a traitor and a coward. This man is both: a coward, because to save himself he would through perjury, destroy his alleged confederate; a traitor he is to friendship, confidence and honor, even among thieves. By his own confession he entered into a common enterprise, and after having shared the common hazard and a common spoil he betrays those with whom he enlisted. He is no youth, corrupted by the defendant. Years before he claims any association with Frank James he was a convicted horse thief, a penitentiary graduate.

For fifty years the British government, from which comes our noble heritage of common law and civil institutions, has suffered no citizen of that realm to be convicted on the uncorroborated testimony of an admitted accomplice in crime. How desperate must be the cause of the state when it resorts to such a witness.

You, gentlemen of the jury, have never met with such a

constellation of atrocities in any one man as this fellow represents in his character. He comes, just before this trial, to this state, crawling vampire like, from the jail in Alabama, to drink the life blood of this defendant; to taint the sanctuary of justice with his false breath, instinct with venom, and wreaking with treachery to the offices of friendship and hospitality.

He should never have been permitted to pollute the Bible by taking the oath on the book. He should have been sworn on the knife—the dagger—the proper symbol of his profession. A superserviceable rogue, coward and pander, he is ready and willing to swear without mercy, stint, limit or conscience, to make sure of his victim.

Did you observe, gentlemen of the jury, while on the witness stand, how he smirked and giggled with evident satisfaction at his smartness, as he detailed the facility with which he snatched other men's horses from hitching posts and stables, as boys pick blackberries in August? By his own confession he is guilty of all that public rumor and indictments have imputed to Frank James. Highway robbery and murder are his pastime.

By the law of this state he is disqualified from exercising the ordinary privileges of citizenship—of suffrage and sitting on juries. The law says, through your state legislature, that this man Liddil is so steeped in crime, so morally tainted, he is unfit almost to be a citizen, disqualified from exercising the functions of official trust, or to handle the ballot, or to sit in the trial of the rights of property, liberty, or life, between his fellow men, or the public and a citizen. There is not a man on this jury who would this hour consent that this fellow should sit as a juror between you and your neighbor to determine the rights of property between you as to an acorn fed hog or a sheep with scabs and burrs as ornaments. Yet the prosecution, on behalf of the great state of Missouri, are so desperate in their thirst for the life of Frank James, that, with audacious clamor, they demand of you to believe this wretch, and take human life predicated of his credibility. You will do no such thing!

Gentlemen of the jury, I witnessed here in this court house a sight I trust my eyes may never see again in an American court of justice. Let me go back a little. This witness was confined in jail in Alabama. Before the last term of this court he was brought to Missouri to testify against the prisoner at the bar. He was bailed, and no doubt offered his freedom, on condition of swearing away the life of Frank James. He has been smuggled, hid and concealed from all other eyes than those of his masters and trainers in Kansas City. Like some curious animal brought from Eastern jungle for exhibition, he has been kept concealed from the public until the circus opened. He has been fed and housed at the court house in Kansas City under the guardianship of supple officers of that county, exercised I presume, only between suns. The day before he was needed here he was, at the bidding of the prosecution, put under arrest for some undisclosed offense. He is neither jailed nor bailed, but put in charge of a deputy marshal of that county and brought here as a prisoner, escorted around town, on exhibition, as the master swearer of the age, who was to swear away the life of Frank James as baselessly as the two men of Belial swore away the life of Naboth. No person, outside of the elect, was permitted to come in contact with the creature, as if he were a leper. He and the deputy marshal have been inseparable since coming here. They eat together, sleep together, until they begin to look alike and smell alike. And when the sheriff of this jurisdiction called Richard Liddil as a witness, he came into the court house and on this platform, to the witness stand, and by his side came and sat throughout his testimony his *alter ego*—his body guard and shadow—the deputy marshal of Jackson county.

Mr. Wallace was unwilling to trust the man on the witness stand without this physical pressure—without the deputy, with eye of menace gleaming upon the wretch, as if to scream at him: swear! swear! you scoundrel, or I will rend you with the talons of the law!

Such are the agencies employed to gratify private ambition to secure a verdict of guilty in this case. It was a spectacle worthy of the worst despotism of the meanest tyranny of ancient times, but a reproach and a shame to a free, Christian Republic, with a written constitution, reposing for its security and glory upon the rights of individual man.

What a galaxy of witnesses—what a cluster of virtues—the state presents to you, gentlemen of the jury, for your justification in taking human life. Circling around Liddil come the Fords and Mrs. Bolton, to swear that Frank James was in the country at the time of the robbery and homicide in question. What a cockatrice's nest that was to hatch out vipers! I dislike to assail a woman under any circumstances. In a land like ours where woman is so universally respected, her very name should at once be the assurance of her strength and the amulet of her protection, but my observation has been that a woman, as has been said, is like a stone, the higher elevation from which she falls the deeper she sinks into the mire. When she does fall, like Lucifer, she falls forever.

Mrs. Bolton is a bad woman. Her whole family are wicked and degraded. There is neither virtue nor truth among them. For money or hate they would dare any desperate thing. All their neighbors, the best men in Ray county, come here and testify that these people are unworthy of belief. But if no witness spoke against the general reputation of this household, if their testimony did not destroy itself with palpable contradictions and inconsistencies—the attendant circumstances of the Wood Hite tragedy in the Bolton castle are enough to damn the whole family with inefaceable infamy and perjury.

Dick Liddil was hibernating in that robber's den. On the fifth day of December, 1881, Wood Hite—cousin of the James boys—arrived at this rendezvous from Kentucky. He was killed in the family dining room before breakfast, the morning of his arrival. Dick Liddil took shelter behind his privilege and declined to tell about it on the witness

stand, for the reason that it might incriminate him. Ah, if there had been no innocent blood on his hands, he could have unfolded a plain, unvarnished story, exonerating himself. Mrs. Bolton came upon the stand. She was as close as an oyster. She knew Wood Hite—a man—was slain in her own house on that Sabbath morn when God's bright sun had risen for his day's journey. She made no out-cry for help—no demand for justice. Like a butchered hog the murdered victim was carried up stairs and covered up in bed, crimson with flowing human blood. During the day she entertained, with hospitable display, her neighbor visitors down stairs, while this horrible corpse was up stairs, breathing no word of the awful tragedy. One false step begets another, and when a witness begins to lie, one lie evolves another. Mrs. Bolton having denied that she saw the murdered man down stairs, says she did not see him up stairs, and that she had never since been in the room above, where he lay all that Sabbath day, a ghastly, bloody corpse. She shrunk, I presume, with horror from contact with that domestic morgue.

The woman, doubtless, has some sensibility left; for it is said there is nothing so black it will not burn to something in hell. Every plank in the floor of that room, and rafter in the ceiling, spoke to her of blood and murder, while the moaning winds through the cracks were but the echoes of the dying man's agonies.

But murder will out. From one of her children, whose age exempted him from pleading his privilege, we extracted a part of the truth. After impenetrable darkness had settled down over the world, hiding the damnable deed from other eyes, late at night the Ford boys stripped from the corpse the pants and coat, which they appropriated to their own use, and wrapping the body, unwashed and all clotted with blood, in a stinking, wornout horse blanket, they carried it out into the woods, and dumped it, uncoffined, without a prayer or a sigh, into a shallow hole, covering it with stones, brush and dirt, and then like ghouls crept back

to their den to plan and scheme for hiding this dreadful deed.

Talk of a jury crediting the evidence of such a family; dead to every notion of human sympathy, insensible to every moral instinct and sentiment which distinguishes man from the savage or the brute, what regard have such creatures—such monsters—for truth or the right?

Now we can begin to discern the governing motive influencing the action of Dick Liddil in turning state's evidence and informer. When he began to reflect upon the possibilities of the discovery of this horrible crime his coward soul quaked. Jesse James was in the country. Would he not, on discovering the murder of his cousin, visit swift and terrible judgment upon the perpetrators? So the conspirators and the assassins fell upon the plan of informers. The state's counsel tell you that Liddil was actuated by a sense of duty in undertaking to deliver over the James boys. Yes, he turned patriot—the last refuge of a scoundrel. It was the ghastly face of Wood Hite, which moved about the murderer's room at night, and dread of the living face of Jesse James, that compelled him to add to his crown of infamies the words: informer and perjurer.

A mysterious bond of interest and sympathy sprung up at once between Liddil and Mrs. Bolton. They became like two roses on one stem—alike in hue and order. Mrs. Bolton, dressed in black—appropriate symbol of death and mourning—and thickly veiled—to screen a harlot's mission—went to see the governor of the state, to open up negotiations for Liddil's and her brothers'—the Ford boys—surrender. This terrible butchery of Wood Hite was carefully concealed from the governor.

The surrender proposed was placed on the high ground of weariness with the life the Jameses had led them, and a desire to serve the state by compassing their destruction. Under this assurance indemnity was secured for her brood Bob and Charley Ford—and her dear Richard. The very bond of this unmixed, unmitigated villain was to destroy

this defendant and his brother Jesse. No honor to preserve, no conscience to restrain him, yielding only to the instinct of self-preservation, he is ready to swear anything and everything to serve his master and get the lion—Frank James—out of his trembling footpath. Jesse James soon went down by the assassin bullet of Bob Ford. This knit the Fords and Liddil still closer together. Dick has since been convicted of crime in Alabama; and the men managing and manipulating this prosecution went his bail and brought him here. He is to be freed from that conviction if he can swear Frank James to the death. No witness was ever produced in any court under such a pressure and with such motives to swear hard and long. And the question for this jury to first answer, when you retire to consider of your verdict, is, whether you will credit the testimony of such a witness under such circumstances.

If you decide him to be unworthy of belief, that will be the end of this prosecution. The state in putting such a rogue, unshriven, on the witness stand admits that she has not a case without his testimony.

It is useless further to discuss the identification of the defendant in Missouri at the time of the robbery in question dependent upon the testimony of the Ford-Bolton gang. The Bolton children are chips off the old block. They but reflect the teachings of the dragon that bred them. The little girl, about which there is so much gush, was brought here and taken by the old lady Bolton and the prosecuting counsel before James, who was pointed out to her. Why, or how, she recognized him she cannot tell. She is to be pitied, and the prosecution should blush.

Touching the identification of Frank James by the citizens of this county, I beg to say that I do not question the honesty of all of them; but I wish you, gentlemen of the jury, to take this thought with you into your retirement. How unreliable is the judgment, how fallible the human mind, in a matter of identity. Much depends upon the accuracy of the eye, the faculty of comparison, the memory—



the power of analysis. Nothing which my profession encounters in practice is so uncertain and perplexing as testimony respecting the identity of animals. I have seen twenty and thirty intelligent and respectable witnesses, with positiveness and earnestness, swear to cross purposes as to the identity of a well known cow or horse, with clearly defined marks to distinguish them.

In the vegetable world there are no two leaves of clover alike, yet, how many men can distinguish them? The human vision is as liable to mislead as the human judgment. The mind, in its operations in psychology, metaphysics, and perception, is a curious thing. Its independant operation is rare. It is oftener influenced by the laws of association. You fix your mind on a certain object, with the previous suggestion that it is a certain thing, no matter what its tints and lights, nine chances out of ten you will conclude it is precisely what it is represented to be. Many a child sees the man in the moon, clearly outlined, because it was told the man is there.

The whole country was taught to believe that Frank and Jesse James were inseparable—that wherever Jesse was there was Frank. As it was conceded that Jesse was in the Winston robbery, Frank's presence, as we lawyers say, went *nem con*. When Frank surrendered everybody concluded they had the man who was engaged in the Winston affair. Everybody went to see him, at jail, with that impression deeply fixed. So, when the identifying witnesses went to the jail to see Frank they had no difficulty in pointing him out, for they were led to his cell. If Wood Hite had been in one cell and Frank in the other, there is not one of the witnesses, unaided, who could have singled out Frank James; no, not one of them. The general description given by the witnesses of Wood Hite covers James exactly, to the average mind; and it would require a close personal acquaintance with both to distinguish them.

Take the instance of Potts, the blacksmith, regarded by the state as an important witness. When he first went to

the jail he could not say he recognized the prisoner. A second time he saw him, and was not satisfied. After Jesse James was killed and Potts was shown his photograph he exclaimed: Why, that is the man I saw in my shop! If Jesse instead of Frank were on trial, Potts and his wife—who swears just as her hubby does would be equally as sure of their man. Old Potts had heard much, in the meantime, of what kind of whiskers the prisoner wore. He had heard talk of burn-sides,—he called them sideburns. He put sideburns on Frank and Dick Liddil; and if this trial had lasted another week he would have had sideburns on the horses. After Potts learned that the horses he shod belonged to the James gang, he recognized every approaching stranger, on horseback or in wagon, as the same men who were at his shop, and would break out of his shop and cover himself in the impenetrable armor of a weed patch.

So with the other witnesses. They went to the jail for the purpose of identifying the prisoner. They knew Frank was in jail. The process by which they reached the conclusion of identity was simple and natural. The mind was prepared for it. They had a full description of him. They had read it in the newspapers, and talked it over with the diligent prosecution. Does any man on this jury believe, if after two years time, when the whiskers, dress, and whole physical appearance of the man were changed, if any of these witnesses had met, by chance, James in the public road, or in town they would have recognized him?

Last fall I spoke at a political mass meeting in Kansas City for one hour. The next morning I entered a barber shop, took the chair, and was shaved. The room was small and there were several gentlemen in there. While shaving me the barber and all present discussed my speech—some in praise and some in dispraise. All of them heard the speech, including the man shaving me. I had on the same clothes, yet not one of them recognized me until told of their blunder.

How many of these witnesses would have recognized

Dick Liddil had he come to his trial unheralded? Special pains were taken by the drill masters for the prosecution to exhibit him and have him identified. No one can tell how he was dressed on that raid, although they can tell all about Frank James' apparel, because they learned it from Liddil's story. Liddil is as marked a man in appearance as James, or more so. He has a villainous look, with a protruding eye, lying around on his cheek, that no man ought ever to forget.

There has been marked industry and work by the state. Even the kind of toes to James' boots has been described, when the witnesses could not tell anything about the shoes or boots of others of the party. On the witness stand we had a striking illustration of the infirmity and danger of this character of evidence. Mrs. Wolfenberger swore with womanly energy and assurance to the identity of the prisoner. She is a positivist—never mistaken. She was asked, in test of her accuracy of judgment, if she had ever seen any of the counsel for the prisoner prior to this trial. O, yes; I saw Governor Johnson here, in this court house, last June. Well, it turns out she was mistaken; she did not see the governor with his smiling, impressive face. She was equally as positive about having seen the governor as she is of having seen James on the raid.

On such evidence of identity, you, gentlemen of the jury, are asked to take this man's life. Beware!

I must not quit this branch of the evidence without noticing the testimony of old man Soule. This witness is a genius—or rather *sui generis*. He belongs to the Pilgrim Fathers. He came over in the Mayflower, beyond a doubt. He is a regular Praise-God-Barebones. In the absence of camp meetings and elections, he is perishing for a hanging. He knows he has the right man. He has brooded so long and intently over the delivery of his testimony on this trial that he actually panted under its burden. He was a regular pent-up Utica. I thought he would burst. He sat one heel on the other of his brogans, threw his head back to the

buttons on the back of his coat, and shot up his waistband where his nose should have been. He started to get out of his clothes, in illustration of an answer to a question put to him by myself, and if the judge had not stopped him he would have been in dishabille before this jury, dancing the racquette. He saw Frank, and don't you forget it. He traced the horses which Frank and his companion rode, around to Montgomery's where the party, whoever they were, took supper that evening. Clearly therefore the man who is identified by Soule as Frank James is the same man who went to Montgomery's and ate supper. To complete his testimony, therefore, it was reasonable to suppose that the state would introduce the Montgomerys in corroboration. The Montgomerys were brought here on subpoena at the instance of the state, and were in attendance when the state closed its testimony. Why did not the state introduce them? Is the state seeking conviction, right or wrong? Does this prosecution represent the dignity and honor of the state, or the ambition of private counsel?

The instrumentality of the grand jury—the indictment—this investigation and trial—are, under the theory of the constitution and the law of the land, supposed to be designed solely to develop the truth and attain the ends of public justice. The prosecuting attorney, in his office, represents the whole body of the people. The defendant is equally the object, in contemplation of law, of his protection and vindication. The public prosecutor who would convict a prisoner by withholding part of the testimony violates his oath of office, and becomes accessory to a great wrong.

But the truth is that this prosecution has long since passed from the control of the officer designated by the statute of the state for its management and conduct. It is under the complete and absolute control of private prosecutors, who are seeking victory and fame, ambition and revenge have usurped the high province of justice, and the dignity and peace of the state are bartered away in the greed and struggle of the volunteer and hired aids for cheap glory.

The defense had to put the Montgomerys on the witness stand. Mrs. Montgomery and daughter, who waited on the men at the table that evening, with every favorable opportunity for observation, tell you the prisoner is not the man. And the reasons assigned by them for their conclusion leave no reasonable room for doubt as to the correctness of their judgment.

One other thought in this connection. The striking similarity between Wood Hite and Frank James made it quite plausible for Dick Liddil to substitute Frank for Hite. So much so is this true that if Hite were alive and on trial instead of the prisoner, the same evidence given by Liddil, and that in corroboration, so-called, would apply with equal force to Hite. It must be kept in mind that in order to place Frank James in the Winston robbery the state must show there were five persons in that raid. Four of them are conceded by the State to be Jesse James, Wood Hite, Clarence Hite and Dick Liddil.

Now, only four men were seen together by any witness, outside of Liddil. When separated two were invariably together. To account for the absence of the fifth man Liddil always had him off somewhere on a reconnoitering expedition, to see when the trains would pass the towns or to get provisions. But there came a time when, if there were five men in the party, it was in the power of the state and Liddil to show it by other witnesses. You will remember, gentlemen, that on the day before the robbery and homicide in question Liddil had all the parties on horseback in Daviess county. Jesse, Frank and Clarence Hite were together, Dick and Wood Hite were together—according to Sir Richard. The party of three are accounted for by other witnesses, who saw the group of three together. But where is the witness who saw the other two at or about that time? Liddil says he and Wood Hite ate dinner together. Where? Who saw you? Mark me here, gentlemen of the jury, on every other day save this Liddil, with wonderful precision, could tell you where he stopped and ate. The name of the family was pat

on his lips. He could tell you the number of the children in the family—the dress of each—how their hair was combed, and how the nose was kept. He could describe the host and hostess, the character of the house, the stable and outhouses. But on this important day, when he and Wood Hite dined together, and which would have definitely settled the presence of the fifth man on the raid if corroborated as to this dining, Richard was not himself, but was all at sea. He could not give the name of the landlord, nor any description of the family, the country, nor anything by which we might catch him in his lie.

The old fox was cornered at last. He and his trainers had not anticipated this crisis. If they had, Liddil would have had this fifth man off alone on some reconnoissance.

We are now brought, in the process of this discussion, to the scene of the robbery and homicide. (Here the speaker discussed with elaboration the declarations of law given by the court, especially with reference to the character of corroborating testimony and circumstances essential to warrant the jury in convicting on the testimony of an accomplice.)

You, gentlemen of the jury, must not forget in your deliberations that this corroboration of Liddil must be as to the *res gestae* that it must be material, independent, facts showing the actual presence of the prisoner, not alone somewhere on that raid, but at the time and place of the homicide.

It must be borne in mind that it is an easy matter for Dick Liddil to detail, with great particularity, the events preceding the attack on the train. It is easy for him to detail the incidents of the raid into Livingston county, just preceding, and the *minutia* of the robbery and what followed, for the simple reason that he was a participant in and eye witness of it all. But this is not corroboration in contemplation of the law, as declared to you in these instructions of the court. Who corroborates Dick Liddil that Frank James was present at the homicide? This is the all important, material question; and you must never lose sight of this when the

prosecution are talking to you about Liddil being corroborated.

Strike out of this case the testimony of that scoundrel Liddil and I submit that there is not a scintilla of proof on which an honest, intelligent jury could base a conclusion that Frank James was present at the robbery and homicide in question. No one saw him; no one pretends to have recognized him there. Who shot the deceased, McMillan, or how the person did it, no one knows, so far as we can judge from this testimony. Outside of Liddil's testimony, there is not a man on this jury who can place his hand on his heart and say that the prisoner was within ten miles of the tragedy. Under the instructions of the court, and the solemn bond of your recorded oath, you are bound to say there is no corroboration of Liddil as to the actual and required presence of Frank James at the place and time of the homicide. You can not, therefore, convict this man, without disobeying the law, so it seems to me.

You, gentlemen, are courageous and honest enough, I trust, to say so though all hell rise in arms against you. Even were it conceded that Frank James was present at the robbery, the case of the state must fail. Governor Crittenden told you from that witness stand that that prince of scoundrels and liars, Dick Liddil, shortly after his surrender, told him that Frank James was not responsible for the killing of McMillan; that on the contrary, that when Frank saw that human life had been taken he upbraided Jesse James for the unnecessary act, reminding him that the distinct understanding was that no blood was to be shed, and that had he (Frank) anticipated this homicide he would have abandoned the expedition. That thereat Jesse replied he had done it in order to bind his band more closely. Crediting this statement of Liddil, it shows that the homicide was not committed in furtherance of the prosecution of a common design or undertaking. Neither was it done from the necessity of the situation in which one of the conspirators suddenly found himself while engaged in the prosecution of the design to

rob. It was an act, on the contrary, of pure wantonness, perpetrated by one of the parties wholly aside from the common enterprise, and on his individual responsibility. As such, under the instruction of the court, and upon principles of plain justice, the defendant can not be held responsible for that homicide.

If his Honor on the bench were on trial, you would not hesitate to acquit him on this evidence. Under the law the life of this defendant is as precious as that of the judge, or the chief magistrate of this commonwealth. This is among the chief glories of the Republic; it shields him as it does the most exalted. To sacrifice the life of Frank James at the behest of popular prejudice and clamor is to wound and cut down the spirit of justice, and murder liberty at the altar.

My associates have so clearly shown from the evidence that in fact only four men participated in the attack on the train that I need scarcely add a word to strengthen this part of the defense. The third man who cut the bell rope I am satisfied was the brakeman. Where is he? Why has not the state, backed as it is in this prosecution by the railroad companies, presented him here, or accounted for his absence? He is singularly absent. He was an important witness, as he must have been quite a factor in the transaction. No higher evidence of the desperation and vindictiveness of this prosecution was furnished during this trial than the wanton, cruel and unmanly attack made upon Mr. Brosius. His testimony was pointed. It shows, indisputably and irrefutably, that but two men entered the car. If so the state's theory of the homicide is blasted. Therefore, counsel for the prosecution have sought to destroy the good name and reputation of this young man. How heartless the assault made upon him! He is your fellow countyman—an ornament to the bar and the community. No cloud of dishonor has ever fallen across his pathway.

But for personal ambition, a triumph in this case, counsel, who have known him so long—how pure and manly he is—would relentlessly strike him down, not only before his own



people, but before his wife and little ones. Shame, unspeakably shame, on such methods, and such an unchivalrous spirit. Let your verdict be his vindication.

Gentlemen of the jury, the defense might safely have rested its cause where the state left it. But the prisoner had nothing to conceal, pertinent to this issue. It was his wish to take the stand, and lay before you his whole history bearing upon this investigation. Is there either internal or external improbability in his story? When he broke from "the gang" in Kentucky, before their return to Missouri, where and to whom could he more safely and more reasonably and more naturally turn than to his sister's home in Texas? The world was in arms against him. She lived in a remote frontier settlement, where perhaps he might find shelter from the huntsman's pack.

Counsel for the state fancied they had put the defendant in a cul-de-sac when he could not tell all the places and points of his travel to and through Texas with the same detail, as to hotels, towns and railroads, when traveling through the south at one time with his wife and child. Why is it, they ask, he cannot give the names of the houses, etc., in his tour through Texas? Frank James' ways and methods, Mr. Wallace, were too deep and strategic for your ken, else you and your Jackal pack would have scented the game, and secured the prize money before he disappointed them by surrendering to the governor.

The situation and tactics of Frank James, while traveling with his wife and child, in a densely populated country, was necessarily, or naturally enough, quite different from traveling to and through Texas. What was consummate tact in the one case would have been mortal stupidity in the other. In the Atlantic States he and his wife were utter strangers. The very manner of his open travel, with wife and child, attracted no attention. But in Texas he was alone. Its towns and thoroughfares are peopled with Missourians—with men who marched and camped with him during the war. Traveling alone he had no occasion to go

to hotels. At Denison he trusted alone to a single friend. From there to his sister's he rode, a solitary horseman. He asked nobody's name, as he would not provoke inquiry as to his own. At his sister's house he remained in absolute seclusion, for the very obvious reason, that had he exposed himself to strangers and cowboys, it would have excited inquiry as to who he was, and what he did there. When he rode out for exercise he was a ranger. When he went to Denison to meet his friend, to hear from his wife, he rode through the Indian Territory, and accepted the hospitality of the no-talking Indian.

But why don't you give up the name of the friend at Denison, inquired the state's counsel. I'll tell you frankly: It is because Frank James, unlike your pet, Dick Liddil, never betrays a friend or foe. Situated as Frank James was, with the royal posse comitatus of a state after him, with a swarm of detectives and spies scenting his footsteps like sleuth-hounds, stimulated to assassination by large rewards, it was perilous for any citizen to give this hunted man shelter, bread, or to be even the medium of a word of love from his far-away wife. Whatever the world may think of Frank James he is made of that stuff, before he would expose to public obloquy, with his consent, the name of the man who thus succored him, he would march to the dead-fall on the scaffold as calm and intrepid as did the grand marshal of Saxony to his untimely grave.

We had in the progress of this trial a striking illustration of the inviolability of the laws of hospitality and personal confidence. Frank O'Neill, the accomplished correspondent of the Missouri Republican, when asked on the witness stand to give the name of the third person present at the interview had by him with Frank James, just prior to his formal surrender to the Governor, declined to answer, for the reason that to do so would be a breach of confidence, and unnecessarily subject to criticism a friend. It was manly and brave in him to stand and keep faith. And the court showed how sacred is the regard for that unwritten law of friendship,

in that he would not enforce a disclosure even in a judicial investigation.

What was a virtue in O'Neill, ought not to be an incriminating act on the part of Frank James. I honor the man who would die for a friend rather than the wretch who would betray an enemy.

If Frank James was not in Texas, as he testified, Palmer and wife are perjurers. Had their testimony been fabricated, Palmer would have had himself a home all the time James was there; and Mrs. Palmer would have had him there on the identical day of the Winston robbery. But she told her story, let it bear as it might. Is Mrs. Palmer unworthy of belief because she is a sister? Is it the unwritten law of a Christian land that where blood runs thick and sisterly love is quick, perjury knots and breeds? You, gentlemen of the jury, beheld her on the witness stand. You looked into her calm, sweet face, all over which God has written innocence, purity and truth. Will you brook its persuasive eloquence and stamp it with perjury, that Dick Liddil and the hangman may chuckle in their triumph?

Nor is that all. If that smirking scoundrel, with a heart all dead to pity, festering with the canker of multiplied crimes, is to be believed, Nickolson, John Samuels, Tom Mimms, and old Mrs. Samuels have each, separately, sworn falsely and corruptly. But who impeaches them? Public fame speaks here through no witness against their reputation for truth. No breach was made in the consistency or reasonableness of their testimony by either a rigid, skillful, or bullying cross-examination.

Mrs. Samuels, it is true, is the prisoner's mother. I know how the unfeeling world and a censorious, sensational press have chided her—even making her the subject of ribald jest. But whatever else she may be to the world, she is to this prisoner a mother. Whatever he may be to the jaundiced public eye, to her he is a son—her boy Buck. O! how much of divinity and consecration are wrapped up in those two words—mother, child! How the one stirs while it chastens

our youth; while the other quickens the pulse and gladdens the heart of old age.

It has been whispered about this temple of justice, and into too-willing ears, that this old mother is unworthy of belief, and ought to have staid at home. The icy heart often tells the mother to let her child go; but the instinct of a mother's heart knows no policy, it employs no strategem and deploys no vidette. Like the intrepid Douglass, who carried with him on the Crusades the heart of Robert Bruce, and flung it into the midst of the foe, where carnage and death rioted, in order to inspire his seldiers to its rescue, the mother will follow her heart—her child—wherever perils most beset him.

Who will banish her from this court room? Who shall set bounds to her devotion, measure, estimate it, or reach down to its fathomless depths, grasp and bind its operations? Rather go tell the earth to cease its revolutions; the sun to cease to warm; and the sea be still.

As day unto day uttereth speech, and night showeth knowledge thereof, this old mother Samuels, never lifts up in prayer, or moves in her daily round of domestic duty, her right arm that its missing hand does not remind her of persecution and suffering endured because she was a mother. And if, as often as her children have looked upon that handless arm, they have felt the beatings of the tiger's heart within them, at thought of the mercenary vandals who, to slake their thirst for gold and feed their ravenous maws on prize money, threw hand grenades into a mother's home, tearing muscle from muscle and bone from bone, and murdering her innocent helpless child, is it too much, in human nature, to say the world ought to forgive them much!

If Frank James was in the country, at the time of the robbery and homicide in question, she knew it, as did her family. They swear he was not; and the mother was told by Liddil that Frank had gone south. Before they were placed under the necessity of swearing otherwise, under the compact to destroy the defendant to save their own necks, Dick

Liddil, Mrs. Bolton and the Ford boys, over and over again, declared that Frank was not in that raid. Will you believe them then or now ? Dick Liddil told Frank Tutt, Crowder, Chiles and General Shelby that Frank James was not here. He then had no conceivable motive to deceive these men, whereas he now has every motive and incentive that a bad, desperate, cowardly man could have, to place Frank in the robbery.

Every instinct of humanity, every sentiment of chivalry and justice and mercy plead with you to disbelieve that cringing, crawling recreant, Dick Liddil. A man who lies without oath will lie under oath.

Gentlemen of the jury, exhausted, physically, as I am, in the stifling atmosphere of this crowded room, and weary, to impatience, as you must be, I can not leave this case without saying to you, and to the country, that I had still another incentive in accepting the defense of this man. It was one sentence in the letter asking for my services. Its sentiment touched and entered my soul. It declared that the prisoner had but one object, one hope, which was to devote the remnant of his days to the state as a good citizen, and to earn for his wife and child an honest livelihood.

I had heard of the little woman, spotless as the falling snow, whose youth, like the season it typifies, was one crowded garland of rich and fragrant blossoms, refreshing every eye with present beauty and filling every heart with promised benefits ; who, spurning the smiles of the world, gave to the bold rider her virgin heart, to cleave to him in shadow as in sunshine, in sorrow as in joy. And as I have witnessed how loyally she has kept her vow, how like a good angel she has attended him at rest or wandering, how closer she has drawn the cords of affection about him as the pelting storms of vengeance and hate have pitilessly beaten about the iron doors and grated windows of his prison, I have felt that if I could utter a word that might give to this noble woman the man, unfettered, to whom she so clings, it were an honor more to be coveted than offices and the praises of men.

Before taking my seat, gentlemen, allow me to speak a word of warning and courage. I am mindful of how potential is that which we call public sentiment. Sometimes it is healthful and curative in the body politic. Then again it is morbid and vicious. Sometimes it is honest, just and brave. And then, too often, it is hollow, rotten, ignorant and cowardly. You will be told, doubtless, by the ambitious, volunteer counsel who is to close this case for the state (Mr. Wallace) ostensibly, but who is in quest of fame and popular applause, that the eyes of the country are on you; that the good name of Missouri demands this man's life. For one I am glad of the opportunity to say that I am sick unto disgust over the ceaseless maudlin twaddle about poor old Missouri. It is the slogan of an unprincipled partisan press. It is the cant of hypocrites and the refrain of demagogues.

I yield to no man in my attachment to Missouri. My people, of my blood, stood by its cradle when it was born. With rifle they fought back the savage, trampled down the wild brier and bull knettles, and blazed out the paths that have led to her present splendid civilization. On her generous bosom I was cradled. Her honor and glory are as dear to me as the memory of the sainted father and mother who sleep beneath her sod. I am proud of the state, her peacefulness, her laws, her patriotism. The most lawless and recreant men in the state are the miserable politicians and editors who malign and slander her good name. I do not think it necessary, in order to appease them, or the land agents, or the long haired men and short haired women, who imagine themselves the satellites of higher civilization, to attend the star of empire in its westward flight, that one day out of every seven should be set aside by executive proclamation for the hanging of an old Missourian.

To convict this man because some town politician or public clamor demands it, would not only be cowardice, but judicial murder. The men who cry out for the life of the so-called outlaw, no matter what the proof or the law, are themselves outlaws and demons. No, gentlemen, this court house

is the temple of justice. The voice of clamor, the breath of prejudice, must not enter here. You are sworn sentinels on guard at its portals. Do your duty. Stand, and stand forever on your oaths. Remember that after all the true heroes of this world are its moral heroes. The Aztec who can tear out his heart and fling it while still palpitating as an offering to his God, is simply an untaught barbarian. The soldier who can march up to the cannon's mouth, the fireman who can mount his ladder wreathed in flames and go to the rescue of human life, exhibit splendid courage. But often this is mere physical courage. The man who can die for truth, or face the frowning, mad, unappeasable multitude, and stand immovable for the right, is grander and braver than all others.

To uphold the law, and bring offenders to justice, is a most important duty of citizenship. But the higher tribute to the law is when court and jury can rise superior to popular outcry, above the foul air of prejudice and passion, standing calm and serene on the mountain heights of justice and mercy, declare that here, in this land, dedicated forever to law and human freedom, no man shall be convicted on rumor or suspicion, but only on the evidence of lawful witnesses and according to the law of the land.

Thus spoke our Anglo-Saxon ancestry six hundred years ago at Runnymede, when the Magna Carta itself was born.

Freemen of Daviess county, let it not be said of your verdict that law and personal freedom have, in their march across the centuries, lost one atom of their vigor, or virtue, by being transplanted in American soil. Be brave and manly. If you err, let it be on the side of mercy. It is God-like to be merciful; it is hellish to be revengeful. I will have mercy and not sacrifice, said the Saviour when on earth. Let your verdict be a loyal response to the evidence and the spirit of the law; and as true manhood ever wins tribute, when the passion of the day is past, and reason has asserted her dominion, you will be honored and crowned.

*September 5.*

*Mr. Shanklin* defined his position in the case as that of a man who was proud to serve a friend in the person of Circuit Attorney Hamilton, and at the same time to perform toward the state what he regarded as an important duty. He denied emphatically that he was the employe of the Rock Island road in this prosecution, but even though he were he should not be ashamed of it, and were he a juror, and were an attorney for the defense to insult him by trying to affect his verdict through a charge that an outraged corporation was assisting in the prosecution of the case, he would spit in the face of that attorney—if the latter were not too big. He reminded the jury that although the defendant's name had been associated with the robbery of the Liberty bank; with the killing of the Rock Island engineer near Adair; with the killing of the bank cashier at Northfield; with the murder of Sheets in the Gallatin bank, and with the commission or other crimes, the only issue before the jury on the present occasion was whether Frank James was a participant in the Winston robbery.

*Judge Philips* took exception to these remarks as improper.

The Court said it would not have permitted them to be made had not Judge Philips himself made reference to the association of the name of Frank James with crimes on the date of his locating in Tennessee.

*Mr. Shanklin* said that while he could not make the ornate and eloquent speech that Judge Philips could, he had the consolation that Josh Billings found when he contemplated the fact that he couldn't make the speech that Henry Ward Beecher could. Josh said that while that was the case, it was comforting to know that Henry Ward couldn't make the speech that Josh Billings could. The defense depended entirely on the testimony of the relatives of the defendant, and upon that of the harborers of the robber gang. As for Mrs. Samuels, he had no fault to find with her for harboring her own sons, but he did blame her for failure to endeavor to reclaim them, and for harboring Dick Liddil, Jim Cummings,



the Hites and other members of a gang she knew to be engaged in robbery and murder. He did not blame Gen. Shelby for retaining a regard, after the war closed, for the men who fought with him, but he did blame him for allowing his regard to make him a harbinger of criminals, be they old comrades in arms or what not. He never conceived for any man a friendship so deep that it could survive the perpetration of murders and robberies, and self-respect as well as a duty to society and the state forbade it. Judge Philips had spoken beautifully concerning his own attitude in this case, and the defender of a man whose flag had gone down when his own went up in the great civil war, and the inference had been that a champion was needed to defend in Missouri the liberties and rights of the men whose flag had gone down when Judge Philips' flag went up, and yet I remind you that in the United States senate there are today a Vest, a Cockrell, and in the chair of the attorney-general of Missouri there is a McIntyre, all of whom had fought under that flag which went down when Judge Philips' flag went up, and all of whom it was the delight of the people of Missouri, whatever their flag had been, to honor. But these men had not gone into the profession of robbery and murder. As a matter of fact, the war and its issues had nought to do with the present case, and the only issue was whether Frank James, who had been characterized by counsel as the most remarkable man of the nineteenth century, who was the oldest and the last of the most formidable gang of robbers that ever cursed a state or disgraced a nation, and who, having passed the prime of life and lost his vigor and strength, had as a last resort surrendered to the governor in the hope of escaping the punishment he deserved—whether this Frank James was one of the men who robbed that train at Winston on which two innocent men were butchered. At no time since 1870 had any conditions existed which would have denied to Frank James a fair trial had he surrendered to the state and at no time had he been outlawed, there being no such process as outlawry known to the laws of Missouri. The pretense then that a fear that he could not get a fair trial kept him in his

evil ways would not stand investigation. The position of Judge Phillips that the mere surrender was a vindication of outraged law hardly deserved serious consideration. The law would never be vindicated till the defendant had answered in court to each of the charges against him. But if it were correct, why was it that Frank James surrendering became an object for charity and kindly feeling, while Dick Liddil, who had not only done the same thing but had followed it by doing splendid service for the state, should not be accorded the same and should be characterized as the most hateful of created things as Judge Philips has characterized him. The logic of Judge Philips had become lost or drowned in his flow of eloquence. As to the chivalry of Frank James in refusing to give up the name of the man who harbored him in Denison this was simply a wretched subterfuge when compared with the willingness with which he betrayed his dead brother, charging him with brutal crime and rendering his children infamous.

*Mr. Johnson.* I arise to make the closing appeal to you in behalf of my client. It is to be an appeal for life. A verdict of any kind against him under the instructions means death. The scaffold and the penitentiary are to him in consequence one and the same thing. Encompassed by dangers, oppressed by anxieties for the future of those whom he loves, wounded in body and broken in health he must soon find the relief of liberty and the peace of domestic life or accept the quiet of the grave. It is not for me to dwell upon his past, except in so far as it is revealed in the testimony given at this trial; but take it as you may your verdict is to affect the weal or woe of one of the most remarkable characters of the century. History shows not his parallel. Back of the time covered by this investigation his career begins amid the fierce conflicts of border warfare, and though bearing a name stained with crime his course has been marked by an unwavering adherence to a great revolutionary cause, fidelity to friends, and an audacious bravery unquestioned; he is the product of our own civilization, a se-

quence of our past political history. I warn the jurors against the danger of allowing your verdict to be affected by public clamor, although the court has given instructions which would render a verdict of murder in the second degree possible, the evidence is such that if you convict the defendant at all, you convict him of murder in the first degree, and your verdict must be that or nothing. The prosecution has ingeniously secured the instruction for murder in the second degree in order that if any of the jurors were not sufficiently convinced to be willing to forfeit Frank James' life, they might agree on a compromise verdict. The whole case rested on Dick Liddil. Without the testimony of this confessed robber and assassin, there was no evidence of a conspiracy; there was no evidence to bring the defendant back to Missouri; there was no evidence as to the manner or plan of the robbery, and there was no evidence proving the presence of the defendant at Winston on that night. On the rotten foundation of Liddil's evidence, however, the state's officers, impelled more by ambition than a desire to serve the ends of justice, had by cunning workmanship erected a very imposing structure. The case which they had made, however, is like a fine building on a foundation wall of soft clay; like a handsome clock without a mainspring; like a strong log-chain with a link of wood or lead in it, or like a great arch with a keystone of putty—it will not stand the test of investigation, I propose to show. I acknowledge at the outset that no abler prosecutor than Mr. Wallace could be found north of the Missouri river, and I compliment him on his industry and ingenuity. Mr. Wallace however, was a young man inordinately ambitious, who, instead of taking all the legitimate evidence obtainable and building his structure with it, had planned his structure or made his theory first and then selected such of the evidence as could be trimmed or twisted or squeezed into service toward sustaining it and filling it out. Did any testimony offer which conflicted with his theory he in his determination to convict this man rejected it, no matter how strong or truth-

ful it might be. For instance, when Ezra Soule came and told him that he could identify Frank James as one of two men he talked with in the woods near Winston and as one of two men whom he tracked to the Montgomery house, Mr. Wallace eagerly seized upon Mr. Soule as a witness, valuable not so much to the vindication of justice as to the support of his theory; but when Mrs. Montgomery and her daughter came to him under their subpoena and told him that the man whom Mr. Soule declared to be James had in fact taken supper at their house, and that he did not even resemble Frank James, but, on the contrary, answered fully the description of Jesse James, Mr. Wallace did not feel that justice or his theory could be served by giving Frank James the benefit of this disinterested testimony, and he left them off the stand. This is the character of the prosecution which I am combatting, and I propose before I finish to convert the state's magnificent fabric into debris. (*Mr. Johnson* then proceeded to trace the career of Liddil, from the time when he first showed himself as a horse-thief on his own hook through his membership in the gang, his various crimes and depredations and finally his crowning iniquity as an informer; made a hideous picture of the Wood Hite tragedy in the Bolton house, and drew artfully on the powerful incentives which Liddil had for becoming a tool of the prosecution.) It was the incentive of fear of the vengeance of Jesse James, who was Wood Hite's cousin; of hope for immunity from punishment for his many gross violations of the law of the state, and of cupidity for the blood-money which he expected to receive for his betrayal and destruction of the men who were his companions as well as the men whom the state desired to force into the position of his accomplices. With all of these incentives in view, was it not fair to presume that he and his fellow-conspirators, the Fords, would have killed Frank as they did Jesse, if they were on such terms with Frank as would have enabled them to know his whereabouts. But he had enjoyed no such relations, and had to content himself with waiting till Frank.

should be secured, in order that he might then earn his liberty and his blood-money by forcing upon the scaffold this man, who had tried so hard and for so many years to break away from the associations which were so hateful to him, and who had tried so hard to induce the gang to abandon the very project which formed the false foundations for this present case. Before Frank James surrendered, however, Liddil had told Gen. Shelby, Capt. Crowther, Capt. Tutt and Mr. Childs that Frank had nothing to do with the Winston robbery, and that owing to a difference between him and Jesse they had had nothing to do with each other for two years. This statement was borne out by all of the facts of the case, and these parties, none of whom were impeached or impeachable, were so many strong and disinterested witnesses, and in corroboration of Mrs. Samuels, John Samuels, John Nicholson, Mr. Myrums, Mrs. Palmer and Mr. Palmer testified to the absence of Frank from the country at that time, all of whom were actuated, if by any incentive at all, by the incentive of love for this man, who was son, brother-in-law or cousin to them; an incentive which never yet had been regarded as constituting an impeachment and an incentive of which none of them were ashamed. Thus was Liddil made to serve as a powerful witness for the defense in that these statements of his were against his own interest, and, therefore, entitled to credit, even were there no corroboration. The state's single rotten witness connecting Frank James with the Winston affair was, therefore, flatly and overwhelmingly contradicted as to the main fact by nine respectable and unimpeached witnesses. The charge that Frank James was the oldest member and the leader of the band was refuted by the state's own witnesses, who proved how blameless a life he led while Liddil and the others were marauding and bringing suspicion upon him, forcing him meanwhile, because of the fraternal tie between him and Jesse and because of old associations, to harbor them.

Remember the tearful and prayerful endeavors on the part of Frank James' little wife, by which she reclaimed

him to good citizenship; of her broken-hearted abandonment of the home in which her child was born and in which she had doubtless built so many air castles; of her terrible apprehensions as she said good-bye to the only home she had known since she left her father's and of her heroic, hopeful trip to Missouri to get from the Governor some such expression as would enable her and Frank to come back and again settle down to domestic life. All this scouts the theory that Frank at that very time was arranging with the others to capture a train. The very fact that she came to Missouri where the next strike was to be made, was in itself an argument against the idea that he was coming on such a mission.

Mrs. Bolton's statements to the coroner's jury with the testimony of the other nine witnesses prove Frank James' absence. In regard to the question of identification in which, outside of Liddil's story, the state's case hangs, I am very fortunate in having right by my side Mr. Wallace and Mr. McDonald of St. Louis, who wear whiskers strikingly similar and the contour of whose features is quite similar. I ask the jury to look on those two men and imagine whether, having seen either of them but once, they could not a year hence mistake the other for the one, especially if nothing had occurred on the first occasion to cause them to look for distinguishing marks. When a man has worn a full beard and shaves it off, his best friends sometimes fail to recognize him. What reliance is to be placed on the statement of the blacksmith, Potts, who, two years ago, saw a man with a full beard, under very ordinary circumstances, and who now comes in and identifies a man with a smooth face as the same person.

Mr. Johnson offered a number of other illustrations of mistaken identity, such as the Tichborne case, and mentioned how the proprietor of the hotel here had this very day accosted and made several inquiries of M. Martin Williams under the impression that it was Sheriff Timberlake who had been one of his boarders for two days. Gentlemen, I once

stood by the side of a woman who was despairingly watching her husband as he sat on the ledge of a window on the fifth story of a burning building; when all seemed lost a ladder came and a brave fireman bore the man down the ladder and laid him, almost insensible at the feet of his half-crazed wife; how great will be my satisfaction should it be my grand privilege to play the part of the fireman on this occasion.

*September 6.*

MR. WALLACE FOR THE STATE.

*Mr. Wallace.* May it please the Court, and you Gentlemen of the Jury. Appearing in this case as one of the prosecuting attorneys of our state, but in a county foreign to my own, I will not assume to use so holy a word as duty, but simply say that it now becomes my province, to sum up the evidence for the prosecution, and to the best of my ability explain to you the law as declared by the court. You will be kind enough to accept at my hands the sincere thanks of the people of this great commonwealth for the respectful attention you have given to all the details of so long a trial, and the fortitude with which you have borne the tremendous strain upon your patience and your strength. Our friends upon the other side have consumed over twelve hours in addressing you in behalf of their client; of which no complaint is made—it is right they should. The state has occupied about six hours, and I can only assure you that I will be as brief in the conclusion as the vast task committed to my charge will permit.

It seems to have become the fashion in this cause for gentlemen to explain or apologize for their connection therewith, and some have gone so far as to deal in personal history, and to tell you beneath what banner they drew the shining blade in the unfortunate war between the states; and to dwell at length upon their attitude and feelings toward the defendant then and now. Raised in a homely way, gentlemen, I am not much of a hand at explanations and apologies, and do not feel, in fact, that justice is asking any

from me. All I have to say is, that I am here first, by invitation from your excellent prosecutor, Mr. Hamilton; and second, because I feel that an obligation exists between me and the law-abiding people of my county, that having from the very beginning borne an humble part in assisting to rid the fair state of the worst band of outlaws that ever cursed a commonwealth, I should remain true to my course to the end. As for the war I am truly thankful that I was too young to have received a scar either in body—or what is worse and more lasting—in mind. I can only say, gentlemen that with the wondering eyes of a boy, just in his teens, I saw enough to know and appreciate the motive of the counsel for the defendant in going outside of the law and the evidence to mention the swords, and flags, and animosities of a cruel war in a court of justice—enough to know at least the tremendous sympathies and prejudices they would awaken in your breasts by bringing its horrid scenes afresh to your memories. I can only say, that on the border of our state, where the red lightning of murder played the fiercest along the western sky and the dogs of war were turned loose on defenseless women and children, I saw it all; when torch, and fire, and sword and rapine, and pillage, and plunder, and robbery, and murder, and assassination were abroad in the land; when sabred horsemen shot across the prairies and devouring flames leaped from farm to farm and house to house, until both earth and sky seemed ablaze with living horrors—I saw it all; and like a vast panorama it rolls before me as I speak. I can only say, to quit a subject improperly interjected into this case, that when almost the last vestige of property was swept from our house, a gentleman who wore the same epaulets that Col. Philips wore and fought beneath Col. Philips' flag issued a cruel order by which we were denied even the poor privilege of dwelling as paupers under the old family roof; and with not enough of substance to provide against the storms and hunger of coming winter we turned our backs upon as fair a land as ever greeted the rising sun, to wander as outcasts and re-



fugees in the world—and from that day to this unceasing labor has been my master, and ease, as a friend, buried in my youth. But this I know was the stern fate of war; and if there is today in this heart of mine the slightest feeling of hate or prejudice for any man, for anything that then occurred, as God is my judge I do not know it. And I sincerely trust, gentlemen, that wherever you may have been in that dark hour, or whatever may have been your experience, your regard for your oaths will now be such that all attempts to kindle in your hearts the hates of other days, will be hurled back by you as insults to your honor, your intelligence, and your conscience. As for me I am truly thankful for such an experience. I look up and thank my God that he led me through fire and flood, adversity and prosperity; for while it may not have made me a better man, it has certainly cast about me a rough armor, panoplied with which I care but little for the threats, and shafts, and storms of life. But enough of an issue buried twenty years ago and whose skeleton never should have been rattled in a court of justice.

Some of the attorneys for the defense are loud and long in their complaints that your worthy prosecutor is assisted in this case. Compare, I pray you, gentlemen, the number and attainments of the counsel on either side, and see whether or not there is just cause for such complaint. Compare the plain men appearing for the state with the shining orators pleading the defendant's cause. And here you may catch at the outset a glimpse of their client's innocence, according to his own estimate. Innocence has a voice more tender and eloquent than that of any earthly orator, and yet he was unwilling that this voice should come to your ears through attorneys in ordinary numbers and of ordinary ability. He first employs Mr. Rush, one of the most industrious and accomplished lawyers at your bar, that all matters of local import—such as the selection of the jury from the panel, the suggestion of such matters as would appeal to their sympathies, and so on—might be skillfully attended to. He then goes to St. Louis in his search and employs Mr.

Glover, a young man whose opportunities have been such that he by himself should have been more than a match for your humble speaker, whose presence here has been so much criticized and bemoaned; a young man who has been reared in the very center of learning and refinement, in the midst of splendid libraries, and surrounded from childhood up by all the educational facilities that fond and prosperous parents in a great city could afford; a young man whose attainments compare with mine as the star-decker firmament compares with a barren, uncultivated waste, lying on the earth beneath. Still the defendant is not satisfied, and he employs General Garner, the grim old lion whose deep voice has been heard reverberating in all the courts up and down the Missouri Valley for thirty years or more, and beneath whose thunders I trembled when he turned upon me, for it is said he has been accustomed for a long time past to eat a young lawyer raw for breakfast whenever his appetite called for so delicate a dish. Still he is not content, and he crosses the river and comes to Independence, and my friend, James H. Slover, a lawyer of large experience, somewhat young in appearance but Nestor-like, brave in battle, cool in judgment, and wise in counsel, is added to his list.

Immaculate innocence still cries out for advocates, and John F. Philips is engaged; a man whose belltones have reverberated in the halls of the national congress, and whose reputation as both a civil and criminal lawyer extends throughout the west; a man who—to use Robert Emmet's figure—if all the innocent blood he has caused to go unavenged were collected in some vast reservoir, his lordship might swim in it. Still the defendant wants one more, and Charles P. Johnson, an ex-lieutenant-governor of the state, whose fame as a criminal lawyer is bounded only by the Mississippi on the east and the Rockies on the west, is besought to come and plead his cause. He comes, as if looking to higher fields, to make the shining final effort of his life, and show all the world how with skillful hand he could snatch the greatest of all criminals as a brand from the

burning; comes as if for four short hours to exert his magic power in your court, and then—laughing at the foolish jury he left behind, return and enter the gates of his adopted city like a triumphant Achilles with the poor body of blind justice, Hector-like, bound by the cords of his eloquence, and dead and dangling at his chariot wheels. Such, gentlemen, are the giants whom the prisoner has called forth to fight his battle with the law. I describe them one by one, that you may know and understand the tremendous forces that are about you, least unwittingly you be borne from the path of duty in the whirlwind of their eloquence and power. All during the trial you watched them as they grasped at straws, or placed their mighty forms in line in the vain attempt to stay back the resistless tide of evidence, as it came pouring in for the state. You gentlemen, are the twelve pillars upon whose shoulders, for the present at least, Missouri's temple of justice is made to rest, and you could not help but notice how these men in the final argument, like blind Samsons groping in the dark, reached out to find you, threw their brawny arms about you, and to secure a firmer hold, thrust their fingers into every niche and scar left upon you by the bullets of a cruel war. Stand firm in your places as they press against you, lest you and they, the fair name of our state, and all that is nearest and dearest to her people, perish in the ruin that ensues! So much for the attorneys.

Who are the parties to be considered in this most important trial? To come to an impartial and intelligent verdict it is well to bear them all in memory. The first one that presents himself to an unprejudiced mind is Frank McMillan, but it has been so long since you have heard his name that I almost feel like apologizing for its mention. But it can do no harm—nor good. For two years has his voice been hushed in death; and even if I so desired, I could not now catch up the faintest echo of his dying shriek and sound it in your ears, pleading for pity from your hearts, or justice at your hands. He was a poor, innocent, insignificant stone mason, who, in the summer of 1881, with the pale

blood oozing from his brain, was laid away to rest; and for days have the gifted attorneys of his gallant slayer tread above his ashes, with scarcely a whisper of his fameless name. The evidence shows that he, too, had a wife, plain, humble woman, no doubt, dependent upon his daily toil for the food she ate and the raiment she wore. Even now, while I speak, with tattered garments and streaming eyes she may sit upon his tomb, trying to fathom that mysterious Providence by which her stay in life lies slumbering in the grave, whilst his murderer sits at his trial the observed of all observers—the most remarkable man of the age. Let her sit there, gentlemen. We have not brought her here as is oft-times done, in piteous disconsolate widowhood, to crave your sympathy. Let her sit there. Though her heart be as lonely as the grave-yard about her, and her hands as chilly as the rough, rock slab upon which she sits, we do not ask even the poor privilege of bringing her here, to warm for one moment the tips of her fingers at the glow of your hearts.

The second and most prominent party in the case is the defendant himself. His attorneys, as if expecting a response in your breasts, have showered upon him the tenderest touches of pathos, and bestowed the highest encomiums on his life and character—one of them, Mr. Rush, boldly pronouncing him one of the most remarkable men of the age. For myself, I have simply to say that I neither love, hate, pity, nor admire him. He is simply to be regarded as a full matured man of forty, to whom God has given more than ordinary intelligence, but who has set at naught the laws of his country, willfully and deliberately filled his pockets with the spoils of robbery, and bathed his hands in human blood. One of the most remarkable men of the age! In the name of all the Gods who sit on Mount Olympus, in a breath, remarkable for what?—charity? benevolence? self-abnegation? profound learning? business enterprise? inventive genius? patriotism? statemanship? piety—what? I may not answer the question without departing from the record, and I leave

it where it was suggested—in the distorted fancy of hard pressed attorneys. For fifteen years, they tell us, he has skillfully evaded the officers, the detectives, the lightning of the telegraph, and all the machinery of modern government; and now that at last he has been overcome, vengeance should be melted into pity, and jurors should bend the knee and acquit him, regardless of law or evidence.

Fifteen years for evasion, gentlemen, means fifteen years for deliberation, reflection, repentance, departure to far-off climes, and that he is placed in his present predicament he has no one to blame but himself. According to the witness O'Neill, he considered long and well, whether it was safest to brave the dangers that beset him in the black night of barbarism, or, taking his chances, with one leap place himself in the full day and blaze of civilization; and if in the undertaking he perishes, as the night-bug perishes when it darts into the glare of the electric light, he has nobody to blame but himself. If after all these years spent without the walls, he suddenly resolves, as if he had done nothing, to pass in and enjoy the sweets of the Eden of civilized life, and the sentry angel who guards the entrance, seeing his garments dyed with blood, strikes him down with the flaming sword of justice as he passes, he has nobody to blame but himself.

A third party, who, though not a party to the record, is touchingly presented to your view by opposing counsel, is the defendant's wife. And while I may run contrary to the wishes of my associates and to the will of the good people of Daviess county—even should I run the risk of losing the case by so doing—I want to say, that I have in this prosecutor's heart of mine the profoundest sympathy for the defendant's wife. Accustomed all the year around to scenes like this, I have never yet seen the time, when a woman similarly situated did not have the tenderest pity of which I was capable. I am glad she is here, standing by her husband in his trial, and I am as willing you should extend to her your sympathies, as any attorney in the case. When the welcome day shall come and I shall cease to be a public

prosecutor, I shall at least have learned, what I might never have learned, in purer spheres of life—and that is, that the truest, grandest most unchanging thing beneath the stars, is a woman's love. Let a man once reign as king in the heart of a true woman, and she is blind to all his faults, to all his crimes. He may pillage, plunder, burn, rob; he may shed blood until he sits at his trial as a red-plumed murderer, and justice, and all the world look on and condemn, but she sees it not, and will ask to sit by him—and, as I have often known them to plead with the jailer to go with him to his cell, to share his bread and water, and greet as sweetest music the screeching of his prison doors. Yes, true to the instincts of a woman's heart, even Frank James' wife clings to him, and I am glad she does. This is one reflection, however, gentlemen which in these cases, always comes home to a sworn officer, and I trust has already come home to you, as sworn jurors, in the discharge of public duty. I can better illustrate it than describe it. Husband and wife are gathering flowers on the brink of an awful precipice. The husband unmindful of the law of gravity, carelessly, to complete the comparison I will say, deliberately, steps beyond the line of safety, and in an instant is hurling downward. The wife may wring her hands and call on nature to stay her law, she may send after him the warmest, most loving tears, but they will never catch him; nature with her law goes right on, and he is dashed in pieces on the rocks beneath. A little child, just learning to control its body, is crawling about the floor; it gets hold of a dose of poison, secreted for another purpose, and swallows it; in a few moments it is in the throes of death. A loving father does what he can to save it; a devoted sister tries to arouse it with tenderest kisses on its cheeks; a heart stricken mother implores a God of mercy to change his law making poison poisonous, and save her child—but all to no avail; the law of nature goes right on, and the infant is made a corpse. As in the physical world God has set in motion certain unchanging laws which have marched on without exception since the

birth of time, so, and for greater reason, has he promulgated certain great laws in the moral world, which throughout the ages are to remain eternal, immutable, inviolable. One of these laws, as if to show its immutability, he wrote with his own finger in enduring marble, in the words, Thou shalt not kill, and elsewhere added the penalty to be inflicted by human agency. He that sheddeth man's blood, by man shall his blood be shed. A legislature representing a Christian civilization has taken that law and its penalty and embodied it in the statutes of the state of Missouri, and the court has declared it to you in these instructions. Frank James, as will appear when we come to the evidence, has willfully and deliberately broken that law—the law of both God and man; and while you may justly pity wife and child, immutable law should go right on. You can not on your sacred oaths do otherwise than inflict the penalty he so richly deserves. So much for the parties in the case.

Hours are spent, gentlemen, in telling you this is a railroad prosecution. This, of course, is a direct appeal to the supposed prejudice of a jury of farmers against railroad corporations. So far as I am concerned I care nothing about the Rock Island Railroad Company, and represent it in no way whatever. If I have a relative or special friend on earth that ever had an interest in a railroad, or ever saw a railroad bond I do not know it. I paid my way over this road to your county, and expect to do the same on my return. A great ado is made about witnesses having passes. I proclaim publicly more than was proven—that I requested, obtained, and handed passes to witnesses. A railroad that would refuse to do as much to obtain witnesses from other states who would not advance their own expenses, after its conductor had been murdered at his post and the lives of passengers endangered, ought to have its charter revoked and its track torn up by an indignant people. But I say to you that I have nothing to do with any railroad in this case. If the Rock Island Railroad had bridged its way across some vast chasm in your county,

deeper than an Ashtabula, and Frank James had stolen up and burned that bridge, and all the trains on all its lines, without the loss of life, had been hurled head-long therein, until the yawning gulch was filled with hissing engines and crackling timbers, the railroad might look after its property. I would not be here to assist. Yes, if all the papers, records and bonds of the railroads in the union were collected here in some great store-house, and, like the benighted crank who burned one of the greatest temples of antiquity in order to hand his name down the centuries, Frank James, with lighted torch, should come hither in the midnight and fire the mighty structure, until the red flames reached through the clouds and on toward the stars—that would be a stupendous crime but the railroad might look after their property; I should not stir one foot out of my county as a volunteer in their behalf. Oh, no, gentlemen of the jury, this is not a prosecution for the protection of railroad property, and you know it. This is another skillful appeal to the demon of prejudice, and you know it. With admirable cunning they would point you to the magnificent cars, take you inside and show you the beautiful red varnish on the seats and sides, and say, this is what this prosecution is meant to protect. But come with me to the rear end of the smoker; behold the platform and steps and hard by the black soil of free Missouri, each painted red with the life blood of an immortal being, every drop of which is more precious than all the railroads in the world, and let me exclaim to you, here is the only issue you are summoned to try. Did I say only issue? No, not the only one. If that were so, this would be but an ordinary trial for murder. But precious as is the life of an American citizen, there is a deeper, grander issue here than that. The supremacy of the laws of Missouri and the strength and dignity of her courts are at stake. Not only the life of a human being, but the very life of the law itself is put in issue in the eyes of the world. For fifteen years, it is boasted, has Frank James successfully contended with the officers, the exponents of the law; and now with bold and



uplifted front he comes of his own accord into a court of justice, throws down the gauntlet, and proposes to grapple with the law itself; and the question you are to decide is—which is the stronger in Missouri, the arm of the bandit or the arm of the law.

Let us now look at the instructions, and then at the evidence. The assertion is ventured that no one of you has ever attended a trial in one of our courts, in which the counsel for the defense said so little about the instructions. They embody the law referred to in the solemn oath you took at the beginning of your labors. They are the sign-boards set up along the highway of truth to guide you to a righteous verdict. The first instruction on behalf of the state reads as follows:

First. If the jury believe from the evidence that the defendant Frank James, in the month of July, 1881, at the county of Daviess, in the state of Missouri, willfully, deliberately, premeditatedly and of his malice aforethought, shot and killed Frank McMillan, or if the jury find that any other person then and there willfully, deliberately, premeditatedly, and of malice aforethought shot and killed said Frank McMillan, and that the defendant Frank James was present, and then and there willfully, deliberately, premeditatedly, and of his malice aforethought aided, abetted, or counseled such other person in so shooting and killing Frank McMillan—then the jury ought to find the defendant guilty of murder in the first degree.

You will see that this instruction is drawn in the alternative. If Frank James, with his own hand, in the manner described, shot and killed McMillan, he is guilty; or if any other person in the manner described shot and killed McMillan, and Frank James was present, aiding, abetting, or counseling such other so to shoot and kill, then he is equally guilty. And right here on this instruction there has been a good deal of technical gimlet-boring, with a small gimlet, by the defense, in the vain effort to effect some small aperture through which the jury may creep, and let the defendant out of his predicament. It is contended that this is a trial for murder, not for robbery, and that inasmuch as no eye-witness comes and swears that the defendant was the

particular robber who fired the fatal shot—even granting he was there—he ought to be acquitted. This is what lawyers call a glittering technicality; a plain, honest man would say the glittering dagger with which the heart of justice is too often stabbed in her own courts. Over against this hair-splitting reasoning let us set a very simple proposition. Let us stop up these gimlet-holes with the kind of stuff common sense is made of. Five men rob a train; all five of them have navy pistols strapped to their persons, loaded and charged with powder and ball; a man is killed in that robbery, and the human mind exclaims instinctively—they are guilty, every last single one of them. They came prepared to kill. They did kill. It is murder. By the evidence, in a distant state the horrible crime was concocted; bent on plunder and death, they traveled a thousand miles to the scene of action; each man is loaded with extra rounds of cartridges, and each knows that his companions are similarly equipped; they appear upon the horrid scene brandishing in their hands the implements of death, rubbed and burnished till they glisten in the lamp-light; they shoot at forehead or heart of victim with unerring aim of an Indian at a tossed-up coin, and I will tell you, gentlemen—not to recur to this point again—it was murder in them all, damned and foul, and you can make nothing else out of it.

Now you notice this first instruction says if defendant willfully, deliberately, premeditatedly, and of his malice aforethought shot, etc. By these terms you are to understand that under our law, in all cases where a deadly weapon—such as a pistol or bowie-knife—is the means of death, and the killing is not connected with the commission of some other crime, there are four elements necessary to constitute murder in the first degree: first, willfulness; second, deliberation; third, premeditation; fourth, malice, or malice aforethought. As our law proceeds on that known maxim of moral philosophy that no act has in itself any moral quality, but depends entirely upon the mind, or absence of the mind, of the actor, as to whether it is to be con-

sidered with or without moral quality, these terms all apply to the mind or mental condition of the slayer at the time the act of killing is committed. Willfulness does not mean stubbornness, doggedness, unreasonableness, as we understand it in common parlance. It means that the killing must come from intention, and not from accident; that there is an intelligence back of the act purposing and intending its commission; to be explicit, that an intention exists in the brain of the man to do that which his hands are executing. Deliberation is a wider and more abstruse term than any of the others. In the language of one of our later decisions—copied by the court in this case—it means in a cool state of the blood; that is, not in sudden passion caused by a lawful provocation, or some just cause of provocation. As I take it, deliberation comes from the mental status in which the slayer considers and looks upon the deed at the time of its commission, and we are to view him in the light of all the attending circumstances. If at the time he does the deed his faculties are in their normal condition, and performing in proper degree their usual functions (or are distorted alone through his own fault at the time), and no cause extraneous to himself destroys the equilibrium, and he weighs and considers what he is doing, if only for a moment—deliberation exists, and the killing is murder in the first degree. If, on the other hand, causes extraneous to himself are at work, such as a slight blow given to the person or words used so vile and insulting as to touch the quick his pride of feeling, and thereupon that passion common to us all, rages so like a storm in his breast that the voice of reason crying, peace, be still, is unheeded, and at the instant he kills his adversary, then the law in its humanity excuses, though it does not justify, and the homicide, in Missouri, is murder in the second degree, or manslaughter, as the provocation consisted in words or slight violence. But it is useless to attempt further explanation of this term, as the court has prevented any argument as to the existence of deliberation, by the words, and the court instructs you that

in this case there is no evidence tending to show the existence of any such passion or provocation. It is easy to understand what is meant by premeditation. Its import is in precise accord with its Latin derivation, meaning thought of before. It is the conclusion of the mind to do the act, antedating the act (as of course it must) for any length of time, however short. When the words I'll kill him have been uttered in the mind, premeditation exists; and it makes no difference whether the man is at the time in cool blood or in passion caused by a just provocation. Here you are able to distinguish a wide difference between premeditation and deliberation; the former may exist in both states—cool blood and the passion, described; the latter only in a cool state of the blood, unless, perchance, a man's blood boils from his own viciousness, when the law makes no excuse for him whatever.

Malice, from *malum*, meaning badness, in the abstract, is here used to denote badness in the concrete, namely, a state of badness, in reference to human law, existing in the mind of a being responsible to that law. It does not mean spite, or ill-will, or hatred to any one as we usually understand it, but refers to a state of mind—a state of mind, as indicated, out of harmony with good government and the laws of the land; such a state of mind as a man is in when he intentionally does what he knows to be wrong. That I have explained these terms correctly you can see from the reading of the second instruction, which is as follows—the court using adverbs where I have used the nouns.

Second. The term "willfully," as used in these instructions means intentionally—that is, not accidentally.

Deliberately means done in a cool state of blood, not in sudden passion engendered by a lawful or some just cause of provocation; and the court instructs you that in this case there is no evidence tending to show the existence of any such passion or provocation.

Premeditatedly means thought of beforehand and any length of time, however short.

Malice does not mean mere spite or ill-will as understood in ordinary language, but it is here used to denote a condition of mind evidenced by the intentional doing of a wrongful act liable to endanger human life. It signifies such a state of mind or disposition

as shows a heart regardless of social duty and fatally bent on mischief.

Malice aforethought means malice with premeditation, as before defined.

The third instruction is given on the second or "robbery" count in the indictment, and is as follows:

Third. If the jury believe from the evidence that defendant Frank James, with Wood Hite and Clarence Hite, or with any of them, and others, at the county of Daviess, in the state of Missouri, in the month of July, 1881, made an assault upon one Charles Murray, and any money of any value then in the custody or under the care or control of said Murray, by force and violence to the person of said Charles Murray, or by putting him, the said Charles Murray, in fear of some immediate injury to his person, did rob, steal and carry away; and if the jury also believe from the evidence that defendant Frank James, in the perpetration of such robbery, with malice aforethought, as before defined, willfully shot and killed Frank McMillan—then the jury ought to find the defendant guilty of murder in the first degree.

This instruction needs but little explanation. It is the instruction in the light of which you are to view the whole evidence—as to robbery, killing, and all that transpired. You will perceive that by this you need not find the existence of either deliberation or premeditation. It is given in accordance with the law as it now stands in Missouri—that a homicide committed in the perpetration of a robbery is not necessarily murder in the first degree. If the killing is purely an accident, that is, is no part of the plan of the robbery, and not what the robbers should have known might be a natural result from the manner of their crime, then it is still murder, but not murder in the first degree. If, however, under this instruction, you simply find that the killing was done in the perpetration of a robbery, and willfully in malice, then you are bound to say in your verdict—it was murder in the first degree; and to my way of thinking, common sense presumes in a robbery like this that the perpetrators act willfully and in malice as to the whole transaction. A train robber, armed to the teeth, and knowing that death so often comes as a natural result from this class of crime, ought to be hung if

his pistol explodes in its scabbard from spontaneous combustion, and kills an innocent passenger.

The fourth instruction reads as follows:

Fourth. If you find from the evidence that the defendant, Frank James, at the county of Daviess, state of Missouri, in the month of July, 1881, shot and killed Frank McMillan, and that the act was done neither with the specific intent on the part of the defendant to kill any particular person, nor in the perpetration of a robbery, yet if you further find that defendant was then and there recklessly, intentionally, and with malice firing with a deadly weapon, to-wit; a pistol, into or through certain cars of a railway train, containing a number of passengers, and those in charge thereof, and that while thus firing, said Frank McMillan, being on said train, was shot and killed by the defendant—then you will find defendant guilty of murder in the second degree. Or should you find from the evidence that at the said time and place, said McMillan was shot and killed by any person or persons whomsoever, and that such act was done neither with specific intent on the part of such person or persons to kill any particular person, nor in the perpetration of a robbery, yet if you further find that such person or persons were then and there, recklessly intentionally, and with malice, firing with a deadly weapon or weapons, to-wit, a pistol or pistols, into or through certain cars of a railway train containing a number of passengers, and those in charge thereof, and while thus firing said Frank McMillan being on said train, was shot and killed by such other or others, and that defendant was present then and there recklessly, intentionally, and with malice, aiding, abetting, assisting, and counseling such other or others, so to fire into or through said cars—then you will find defendant guilty of murder in the second degree.

This instruction is given out of the abundance of the humanity of the law, and of the court declaring it. There is a class of cases of murder in the second degree in which the malice in the human heart does not assume any shape with reference to the specific act of killing. If I may so express it, when the poisonous soil of malice does not shoot forth a specific intent to kill the person slain or to kill any person at all. These cases occur when the slayer is recklessly and intentionally engaged in a wrongful act and one known to be dangerous to human life, and death is the result. Here the intent to do the wrongful act is taken away from the wrongful act, and by a law of substitution put over against the killing, and it is murder in the second degree. As where an unnatural mother, desiring to get rid of her child, but not quite

heartless enough to destroy it with her own hands, leaves it in an orchard, and a kite kills it; or where the artisan, not caring whether he kills or not, rolls a stone from his wall into a crowded street, and a passer-by is slain; or where a man recklessly and intentionally shoots in a crowd, and death ensues—in all these cases it is murder in the second degree. So in this case should you find the killing of McMillan was not a part or parcel of the robbery or of the regular plan; that it was a kind of side play; that the act was not done with specific intent to kill; that defendant was recklessly firing down the car to frighten the passengers, not caring whether he killed or not, or was present comforting or aiding others so to do—then it is murder in the second degree, and you should so find in your verdict.

Fifth. The jury are instructed that by the statutes of this state the defendant is a competent witness in his own behalf, but the fact that he is a witness, in his own behalf, may be considered by the jury in determining the credibility of his testimony.

You have heard a great deal about the testimony of an accomplice, about the tremendous motive for such an one to commit perjury in his desire to escape the terrors of the law. What about Frank James' testimony? The court tells you he has a right to testify, but you have a right to consider his situation. Is there any motive here for falsehood. His life is at stake, and he sits in the witness chair with the fearful picture of the gallows constantly before his eyes. If ever a man would swear falsely it is then. "But our client is a knightly, chivalric hero, who fears not the king of terrors," I hear them say. This sounds very well in talk or in yellow-back literature, but it is a known fact among officers, gentlemen, that men of the defendant's class do not differ from the ordinary run of humanity, and when their own time finally comes they are usually as timid as anybody. They may put on a bold exterior at their trial, but the heart within is trembling for its fate like an aspen leaf, and oftentimes, when convicted, and the dread hour arrives, they who have waded without a tremor through rivers of blood, shudder and break

completely down ere the first ripple of their own cold Lethe has touched their feet.

Sixth. The jury are further instructed that to the jury exclusively belongs the duty of weighing the evidence and determining the credibility of the witnesses. With that the court has absolutely nothing to do. The degree of credit due to a witness should be determined by his character and conduct, by his manner upon the stand, his relation to the controversy and to the parties—his hopes and his fears, his bias and impartiality, the reasonableness or otherwise of the statements he makes—the strength or weakness of his recollection, viewed in the light of all the other testimony, facts, and circumstances in the case.

This instruction is easily understood. Your attention is now called to these words used in this instruction: "The degree of credit due to a witness should be determined by his character and conduct, by his manner on the stand, his relation to the controversy and the parties." "Relation to the controversy and the parties;" you remember the witnesses as to the defendant's alibi—brother-in-law, sister, brother, mother—no others.

Seventh. In considering what the defendant has said after the fatal shooting, and previous to the time of his testifying in this case, and with reference to any material matter in issue, the jury must consider it all together. The defendant is entitled to the benefit of what he said for himself, if true, as the state is to anything he said against himself in any conversation proved by the state. What he said against himself in any conversation the law presumes to be true, because against himself; but what he said for himself the jury are not bound to believe, because said in a conversation proved by the state. They may believe or disbelieve it as is shown to be true or false by all the evidence in the case.

The rule of law contained in this instruction is based on the known selfishness of mankind. If a man who has done wrong can say anything in his own favor he is apt to do it—sometimes true, oftener, if his crime is great, it is false. What he knows against himself he is going to keep, unless the heart is so full and a guilty conscience gnaws with a tooth so sharp that he tells in spite of himself, and then the law presumes it to be true. If Frank James, just after the Winston robbery, said to Jesse James, "Why in the world did you kill that



man; if I had thought there was going to be any blood shed I would never have gone into the affair," it was testimony manufactured in his own favor. Its absurdity, if nothing else shows this. Frank James, who knew Jesse James better than any living man—Jesse James, whose victims, shot down in robbery, are sleeping throughout the Mississippi valley—Frank James "backs" Jesse James in the commission of a robbery, and when, as usual, a man is murdered, turns around and says: "If I had thought there was going to be any blood shed I never would have gone into the affair." As I have touched this bit of testimony somewhat out of my regular order, let us finish it, lest I worry you with its repetition when I come to the evidence. It has nothing to do with the legitimate evidence in the case, any way, and has simply been lugged in here in the vain attempt to contradict Dick Liddil by the governor of the state. You remember the whole of Governor Crittenden's testimony was, that just after Liddil's surrender he talked twice with him at Jefferson City, once when he came with Commissioner Craig, and once when he came with Sheriff Timberlake; that in one of these conversations he said to Liddil, "Why was that innocent man on duty killed? and that Liddil replied that after the robbery was over he heard Frank say to Jesse, in Missouri, "Why in the world did you kill that man? if I had thought there was going to be any blood shed I would have never gone into the affair." This is all of the governor's testimony. Liddil denies this, and I honestly think the governor has the matter a little mixed in the multitude of details given him by Liddil. But admitting it is true, it has absolutely nothing to do with this case. "Why was that innocent man on duty killed?" That referred to conductor Westfall. McMillan was not on duty. The whole thing related to Westfall, killed by Jesse James, and not to McMillan, killed by Frank James, and for which he is now being tried. They do but one thing by the governor, and that is to show, indirectly, but unmistakably, by their own witness, that Frank James was in Missouri in 1881, and participated in the Winston robbery; that Liddil told him so before Jesse was killed or Frank had given himself up, or

there was any motive on earth presented for Liddil to tell a falsehood, his very life and liberty depending by the contract in such cases upon his telling the truth.

Eighth. The jury are instructed that the testimony of an accomplice in the crime for which the defendant is charged is admissible in evidence, and the degree of credit to be given to the testimony of such accomplice is a matter exclusively for the jury to determine; the jury may convict on the testimony of an accomplice without any corroboration of his statements but the testimony of such accomplice as to matters material to the issue, if not corroborated by facts and circumstances in proof, should be received by the jury with great caution.

This instruction will be read and discussed in connection with the evidence.

Ninth. If the jury entertain a reasonable doubt to defendant's guilt, they should find him not guilty, but to authorize an acquittal on the ground of doubt alone, such doubt must be real and substantial, and not that there is a mere possibility that defendant may be innocent.

"Well then," some juror exclaims, "if it all depends on a doubt, who can be convicted? We have never seen anything, outside of mathematical demonstration, proven with such certainty that every little doubt was swept from the mind. Why have we been kept here for three weeks if that instruction was to be given?" Such is the view that skillful attorneys would have you take of the law in this behalf; but if you will pause just a moment, you will observe the instruction uses something more than simply the word doubt. A man by searching may find in some remote corner of his mind a mere doubt as to most anything. In fact some of the greatest men of both ancient and modern times have so puzzled themselves with the mysteries surrounding the existence of mind and matter that they lay it down as a cardinal principle in their philosophy, that "We know nothing beyond a doubt." They doubt if they really taste, feel, or see anything; doubt that there is a hereafter; doubt the existence of a God; doubt their own existence. But this is unreasonable; and were others than the eccentric to so reason, all laws and all civiliza-

tion would soon crumble into dust. You will see the word "doubt," as used in the instruction, is qualified and enlarged in meaning by two adjectives, so that the reading is "such doubt must be real and substantial." This is done, doubtless, for the express purpose of curbing the play of fancy in a juror's mind. What is a "real and substantial" doubt? It is a doubt founded on law and reality, and not on fancy; it is a doubt founded on testimony and substance, and not chased down and caught—you know not where nor how—by a winged imagination. You are all farmers, I am told. One of you is plowing in your field: a neighbor comes sauntering up to you, and when you stop he sits down on your plow-beam and says, "What are you plowing for?" If it is springtime, you say for corn, or oats, as the case may be. But he says, "How do you know you are going to raise anything? I am in doubt this season, and have put my plow under the shed and turned my horses on the range." "Why," you say, "with rarest exceptions, God has always made seed-time and harvest to come—the rains have descended and the sun has shown—and with the great bulk of evidence in my favor, I will plow on and raise my crop." "Sometimes they miss," he exclaims—"I doubt it, I doubt it." This, gentlemen, is an unreasonable, unsubstantial doubt. The man went out of the great weight of evidence to get it. If you acted similarly, you and yours would starve. So, in this case, you can easily adopt different rules from those you are governed by in the ordinary affairs of life, and shutting your eyes to the great bulk of the evidence, send out fancy—faster than a swift-winged Mercury—and she will doubtless bring you back a doubt. But this will not do; it must come from the testimony as a whole, and be real and substantial, to authorize an acquittal.

Tenth. If the jury find the defendant guilty of murder in the first degree, they will simply so state in their verdict, and leave the punishment to be fixed by the court.

If they find the defendant guilty of murder in the second degree, they will so state in their verdict, and will also assess the punishment at imprisonment in the penitentiary for such term, not less than ten years, as the jury may believe proper under the evidence.

When an instruction like this is read, a juror may say, "There, then, the whole thing rests with me; my God, I don't want to convict anybody; I don't want to deprive any human being of life or liberty—and the whole thing rests right on me." This is what skillful attorneys would have you believe; but it does not all rest on you, any more than it all rests on the grand jury who returned the indictment, or the judge who received it, or the clerk who recorded it, or the prosecuting attorney, who signed it. You are simply a part of the criminal machinery to pass upon the facts. If you find the fact to be that the defendant is guilty, the law inflicts the punishment, and is responsible for it, not you. The judge pronounces the sentence; but not he, nor the jury, but a wise and just law coming to us from our ancestors, and from God himself to man, carries that sentence into execution. This ends the instructions for the state.

Having looked at the law, let us now examine the evidence of the witnesses. In doing this, gentlemen, you will excuse me, and take it as no reflection upon any one else, when I say that, without skipping about here and there, seemingly for confusion's sake, I will give you in substance all of the testimony of all the witnesses, and as nearly as practicable in the precise order in which it fell from their lips. To save time I shall use no notes; in fact, I took none. But I believe I know the testimony, and can give it to you correctly from memory by the aid of a list of the witnesses. You will excuse me too, if I speak plainly as I go along, calling things by their right names, for I was raised in the same wild west with these men whose exploits we have been considering, and I strive to talk as they shot—right to the mark.

What is the evidence in this most important case? As the sun is setting in the west, on the fifteenth day of July, 1881, we see a passenger train rolling slowly under the vast shed-way at the Union Depot in Kansas City, Missouri, and its engine takes its place by the side of half a dozen or more of

others, each panting like so many horses ready for the race. To me, gentlemen, there is something sublime about a locomotive engine; I can look at it and admire it, even if it does belong to a rich corporation, and I have no interest in it. Thank God, in the great realm of vision, we are equally wealthy. Rolling rivers, towering mountains, outstretching plains, bending skies, as well as the splendid specimens of human skill that fret our public streams and highways, are all in the realm of vision the property of rich and poor alike. Yes, what a glorious structure is a railroad engine, what a giant-like tribute to man's inventive genius; how like a thing of life with vast, pulsating heart, it seems to live, and move, and have its being. When like the queen of commerce it comes gliding along, with gorgeous, resplendent coaches for its train, how the law-abiding soul—with never a dream of stopping it in search of plunder—delights to see it speed on, in magnificent splendor and sublimest power. Many a time, a few years since, while loitering about Kansas City, as young lawyers do, have I stood upon the bluffs and watched the trains as they came in and went out; watched them just at night-fall, when they were all departing for the east; watched them as, hurling down the river bottom, with resounding whistle, rolling smoke, and white, streaming steam, they plunged into the tunnel of the night, and were seen no more.

So the ill-fated Rock Island train departed in July 15, 1881; so it sped on like a meteor through the darkness until it reached the prairies of your own county. What a splendid spectacle is presented by an approaching train on a western prairie in the night-time! I see that train coming up to Winston now, with its beaming headlight, now partly obscured in a cut, now out, trembling along like a rolling, radiant ball of fire. Yes, yes, gentlemen, I see that train speeding across the prairies of your own free Missouri, where the protecting aegis of the law is spread over every head, and we boast that life, liberty, and the pursuit of happiness is guaranteed to every human being within her

borders. I hear the rails clicking by the platform; I see the white steam rise; the whistle sounds out on the pure country air, and in a moment the train is standing at the depot in the town of Winston. Frank James was there to meet that train, gentlemen. Just as surely was he there, as that he is here today. Just as surely was he there as that the village was there—as that Westfall and McMillan were there. Just as surely was he there, as that the All-seeing Eye was there, looking down into the foul intention that dwelt in his heart. Let us look a moment at his surroundings, for here we may get a glimpse at the superb innocence of the “remarkable hero” now on trial. It is said that when a man contemplates doing a wicked deed, if he will look at some splendid painting or upon some scene where nature with her brush has eclipsed all human genius, his vile thoughts may all be taken away. Look at his surroundings on this fatal night. There stands a magnificent train, known to him to be laded with precious immortal beings whose life he is about to hazard. Perchance the mother is there, returning from a visit to her children in the west, or the boy going east to bid farewell to a dying parent. Innocent little children, unborn when civil war brought the defendant his much-talked-of grievance, are there, with tiny hands against the window glass, and eyes peering out, asking his pity and protection. The pure, free atmosphere of his native state is about him. The smoke of the standing engine is towering upward, and as his eyes follow it they meet the tender light from a myriad of twinkling stars, each whispering to him with a silver tongue, pleading with him, as if to woo and win him from his unlawful purpose.

But it is all to no avail. Frank McMillan, old man McMillan, his father and the two Penns—all laborers in a stone-quarry hard by—have gotten into the smoking car. Conductor Westfall, little knowing the sad fate impending, waves his lantern for the last time. The bell rings. The train starts. The robbers get aboard. The fiendish work begins. I am going now by the evidence—no fancy. Dick

Liddil and Clarence Hite climb upon the tender to take charge of the engineer and firemen. Jesse James, Frank James, and Wood Hite rush into the smoking-car from the front door; one of them—as seen by the witness Maj. McGee, a most intelligent gentleman, and at present United States Marshal—cuts the bell-rope, and doubtless in doing so gives the signal at the engine which causes the train to stop; but it at once starts up again. The two tall men, as the witness Penn calls them, come right up to conductor Westfall, at this time engaged in putting tabs in the hats of Penn and his companions, saying, “up, up,” or “down, down,” the witness, affrighted and thunderstruck with the tragedy of double murder, can not say which. Westfall, seeing death was lurking, made some motion thus, as Penn put it; he can not say for what. I believe to defend himself, as duty and God bade him do. Just at that instant the big tall man—all admit now Jesse James—quick as a tiger for his victim, pulls the cruel trigger, and Westfall goes reeling down the aisle to the rear end of the car; as he goes the firing at him is continued. He opens the door, struggles out, and falls dead from the train; dead in the harness! dead on duty!

That was a magnificent specimen of oratory with which Gov. Johnson closed his argument yesterday evening. He said, you remember, that once in the city of St. Louis he stood watching a five-story building wrapped in flames. In one of the upper windows stood a man, with the red flames leaping around him, and apparently no means of escape whilst his wife below was watching with eager and loving eyes for some kind hand to snatch him from the devouring fires and bear him to her arms, till at length a heroic fireman brought joy to her heart by undertaking and performing the noble feat. I could not help, however, gentlemen, but think of something real, and directly connected with this case, as the Governor drew his picture; I could not help but think of poor Westfall, reeling there in the railway car, enveloped in the smoke of burning powder, and wrapped about with the red-hot flashes from cracking revolvers—he himself being on

fire, the red flames of life bursting through the windows made in his body with cruel bullets; I could not help but think of the devoted wife who stood in her doorway on that fatal night, waiting to give the welcome kiss to her husband when his "run" was ended and he returned to his home. Alas! she is waiting still.

We are not through with the scene at the train yet. Westfall has fallen, but the murderous fire still continues. Now it is contended "it was not intentional," "we do not know the particular man who did it," and so on. It makes no difference, you know from the evidence Frank James did it; but if you did not, you would know that one of the band he belonged to—bent on robbery and murder—did it, and that is enough. According to Penn and Major McGee, these men followed Westfall up, and after he had tumbled from the rear end of the "smoker," they go back again to the front of the "smoker" and out of the door. Penn and Frank McMillan now get up, and in search of a safer place go to the rear platform of the "smoker," and take seats on the steps. "One of the tall men" remains on the front platform of this "smoker" firing "as many as six shots straight through the train," crying, "down, down." This was doubtless done to keep the passengers from interfering. Penn gets up and looks through the rear door, and one of these shots hurls the shattered glass against his hand. Presently a voice, as if from one in distress, is heard in the "smoker." Frank McMillan, sitting on the rear steps, says, "That's father's voice." Oh, I think, gentlemen, I know myself how he knew that voice, even in the din of rattling train and belching pistols. It was the staid, familiar voice that through all the happy days of childhood he had heard under the old home-roof; the voice that many a time had called him up to his work at break of day—to the country lad, glorious break of day when rosy-fingered Aurora, sweet dispenser of the morning dew, came dashing in her fiery chariot across the eastern hills, and a thousand birds were twittering greetings to her in the trees. "That's father's voice!" and he bounded to the door, and death met him as he came. The whizzing ball



of the idle, roving assassin meets the sweated brow of hard-working Frank McMillan, he falls dead from the train, and the soil of free Missouri drinks up his honest blood. "Oh, he is but a poor laborer," I hear them say; "what is his life when measured with the precious existence of a daring, chivalric hero?" Gentlemen, when the Almighty God of the universe came into the world, and took upon himself the form of a man, he paid such a compliment to the dignity of labor that he became himself a carpenter, and for years there stood upon His brow, as upon poor McMillan's, the sweat of honest toil. Much has been said to induce you to think this is a prosecution backed by corporations in the interest of capital; but I tell you it was not capital, it was labor that was foully murdered when Frank James' ball went crashing through the brain of the humble stonemason at Winston.

Thus ended the killing at the robbery. I have scarcely mentioned those whose hearts were made to bleed the most. Hours have been spent here in pathetic rhetoric about the defendant's wife, his child, his mother, his sister, and all thought to be near and dear to him. The wives and children of our sleeping dead have been left in the background. This is no place for such issues. I could not depict the anguish of the widow whose heart is withered with the purple blast of murder, nor with the wail of the orphan, that, for aught we know, may cry for bread; and I would not if I could. In cases like this the anguish of the dying and the dead is far less than that of the beloved living left behind, and I could only feebly imitate the example of a painter of ancient times, of whom I have somewhere read. Agamemnon, a noble chieftain of the Grecian forces, was at last captured, together with his family, by his enemies. They studied long how they might contrive to torture him the most. At last discovering that he had an only daughter, a girl of extreme beauty, whom he seemed to love far better than he loved himself, they brought her forth and put her to death by slow torture, compelling the brave old warrior to look upon the fearful scene. A great painter came to the frightful scene to put it on canvas, especially the horror that sat on the father's counte-

nance, and to hand, with his picture, his name and his genius down the ages. He drew the crowd, torturers and all, just as they stood; he painted the suffering girl with the flush of death on her cheek, with matchless perfection; but when he came to the father, standing in grim, silent agony, his genius failed him, and he simply drew a veil over the face, in confession of his inability to depict the horror that sat within. So all I can do in this case is to place Mrs. Westfall here to my right, clad in mourning, with a thick black veil hiding the saddened face; and Mrs. McMillan here to my left, similarly attired; and the little children hiding their faces in the folds of their mothers' dresses—and let me say, these, Colonel Philips, are the trophies of your kind of chivalry.

Gentlemen of the jury, laying aside everything that savors of feeling, what is the plain, unvarnished evidence before you? What are the dry facts, to which, without the least appeal to passion, I now promise to confine my remarks. Who committed this double, dastardly, diabolical murder? If Frank James was at Winston, away with your knighthood, away with exclaiming "who fired this shot," or "who that;" away with technicalities, for justice cries out with a thousand voices, "If he was there he is guilty." If he, who publicly trod the streets of Nashville for four years, was in Texas in his sister's "cellar," or "upstairs," so that not even a neighboring cowboy might see him, he is innocent. If present he is bound to be guilty of murder in the first or second degree; and the whole case turns on the question—was he at Winston or was he in Texas?

The testimony is absolutely overwhelming that there were five men in that robbery, and that this defendant is the fifth man. It was confessed from the outset that Jesse James, Dick Liddil, and the two Hites, were in this robbery, and for four days they proceeded here on the confession that there was a fifth man there; and you saw them vainly striving to show this fifth man was Jim Cummings, and not this defendant. Right in the midst of the trial, for sheer necessity, the "four-men theory"—an insult to your intelligence—was concocted; and the case has been argued to you, by those who

did not argue mostly from "flags" and "swords," on that hypothesis. Let us examine the "four-men" dodge. A moment's analysis of the testimony shows its absurdity. The evidence is four-fold that there were five men: First, the five horses ridden are unmistakably described; second, five men are unmistakably described; third, five men were seen about sundown near the scene of the robbery; fourth, five men are seen and counted at the robbery. First, as to the horses:

No. 1, big bay gelding, heavy mane and tail, about sixteen hands high, described by a number of the witnesses who saw these men. No man who had been on a farm two months could mistake him for any of the other four. This horse Jesse James rode; John Samuels, his brother, owned him, and tells you Jesse was riding him that summer.

No. 2, a little bay horse (gelding), stolen by Frank James and Liddil, in Ray county, and described exactly by a number of local witnesses. This was Wood Hite's horse.

No. 3, a sorrel gelding, about fifteen and a half hands high, ordinary mane and tail, collar marks, no blaze in face, described by a number of local witnesses. This was the Lamar-tine Hudspeth's horse, ridden by Dick Liddil.

No. 4, a tall sorrel, stolen from the witness Matthews, most noticeable of all, blaze face, light mane and tail, white hind feet, sixteen hands high, described by a number of local witnesses. This was Clarence Hite's horse.

No. 5, a little, light-bay mare, stolen by Frank James and Liddil in Ray county, described by a number of local witnesses; shod by Potts, who identifies her in Timberlake's hands, at Liberty, and she is returned to her owner in Ray county. This horse was ridden by Frank James to Winston.

Here are five horses traced by local witnesses to and from this robbery, all totally unlike. Any man on this jury hunting stolen horses could trace them, by description, through the country: First, big bay gelding; second, little bay gelding; third, ordinary sorrel gelding, no blazed face; fourth, big sorrel gelding, blazed face, light-colored mane and tail, and white hind feet; fifth, little light-bay mare. Who rode

the fifth horse?—a myth? A Will-o'-the-wisp? while Frank James was in his sister's cellar?

2d. Five men are unmistakably described by the witnesses:

No. 1. Tall man, heavy, erect, high cheek-bones and broad across face, darkish whiskers all over his face, dark hair, good talker; described in the same way by Mrs. Hite, the Brays, Wolfenbengers and others. This was Jesse James.

No. 2. Man about thirty, average height, stoop-shoulders, light-complexioned, inclined to heavy build, not much whiskers, very slouchy, said but little; thus described by Mrs. Hite and a number of your local witnesses. This was Wood Hite.

No. 3. Man about thirty, dark-complexioned, with dark hair, dark whiskers, short and all over face, average build and weight. This you can see yourselves was Dick Liddil.

No. 4. Tall, slender, light-complexioned fellow of about twenty, front teeth bad and prominent, little fuzzy whiskers; thus described by Mrs. Hite and a number of local witnesses. This was Clarence Hite.

No. 5. Tall, slender man from thirty-five to forty, light-complexioned, wore lightish "burnside whiskers," intelligent, good talker, neat in dress; described in the same way by the Tennessee witnesses, and local witnesses to some of whom he talked about Ingersoll and "spouted" Shakespeare. This was the "remarkable" man on trial.

3d. Just before the robbery five men were seen near the scene of the robbery,—

Ezra Soule, near sundown, comes upon two of them in the woods. One of them, he testifies, positively was Frank James, and the other he describes as "a tall young fellow, fuzz on his face, big bad teeth"—Clarence Hite beyond question. Just about this time, at early supper, two men are at Mrs. Montgomery's, close by. The family are here, and described them: "One a tall, heavy-set, independent fellow, whiskers tolerably long all over his face, darkish, ate with his hat on"—Jesse James; "the other ordinary size, ordinary looking, light-complexion, did no talking"—Wood Hite beyond question; "both rode bay horses." Bad-tooth Clarence, with his blazed-face sorrel, was not there, gentlemen, nor was slender,

said he saw Jim Cummings in the fall of 1881, how they rolled it as a sweet morsel under their tongues, and what a fight was made against letting the old man correct his mistake by saying he meant 1880. You remember, when John Samuels was put on the stand, that he was asked: "Please give the names of all the men at your mother's in the summer of 1881?" and he answered, "Jesse James, Dick Liddil, Wood Hite, Clarence Hite and after the Winston robbery, Charlie Ford." "Were these all; please name them over again?" and he named them precisely as at first. Then came the suggestive question. "Did you see Jim Cummings in the summer of 1881?" Answer; "Yes, sir; he was there with the others several times." Mrs. Samuels was put on the stand, and she was asked to give the names; and she did it just as John did, exactly. "Please repeat them all?"—and she gave the same names again, leaving out Cummings. And then the suggestive question was asked, and answered as John had answered it. A direct, persistent attempt to put Cummings in this robbery; and then they would have argued, "Cummings was the man all these good witnesses took to be Frank James." But their plans are suddenly thwarted. Frank O'Neill, the correspondent of the St. Louis Republican, who had a long interview with the defendant just before his "surrender," testifies that in that interview the defendant described Cummings as an illiterate, indolent fellow, and mocked his long drawl in talking, which I had O'Neill to reproduce: "There—now—that—d—d—Frank James—has—gone—and told—on me," etc. The defense could go no further. To claim this ignorant drawler and the smooth repeater of Shakespeare and adroit discourser on Ingersoll were one and the same person was too absurd, even for this case; and right in the midst of the river they change horses, and the question is asked: "Was not Wood Hite very much like his cousin Frank?" and they all answer "very much." Is this the way to make a sincere *bona fide* defense? I blame not my professional brothers, but venture that in the history of criminal trials never was an honest jury so grossly trifled with. General Garner is one of those ponderous bodies,

which, when well under headway, it takes time to stop; and so thoroughly had he gotten started on the Jim Cummings theory that he clung to it for some time in his speech, but finally came around all right.

But let us go deeper into the evidence. The guilt of the defendant becomes more apparent as we examine the motives and plans leading up to the crime. In Nashville, Tennessee, in March, 1881, four men are dwelling together under the same roof. They are seemingly quiet citizens, but in reality are a band of outlaws, each passing under an alias. Frank James has been about Nashville for more than three years, has a wife and one child; and is known as B. J. Woodson; Jesse James is better known than his brother, has a wife and two children, and passes as J. D. Howard. Dick Liddil is living with them, known as Mr. Smith. Bill Ryan is also there, known as Tom Hill. These facts you have learned from the testimony of W. L. Earthman, back-tax collector at Nashville; James Moffat, depot-master at the Louisville and Nashville depot; Messrs. Horn, Sloan and others. "Much obliged to you for this evidence," say our friends on the other side, "it shows our client wanted to lead an upright life, and was living as an industrious citizen in Tennessee." Yes, I reply, and it shows as much for Jesse James, whom you, yourselves, have held up as a monster in crime. It shows that Dick Liddil and Bill Ryan, so far as outward appearances went, led quiet and honorable lives in Nashville, Tennessee.

A curious incident caused this band to flee from Nashville. Bill Ryan, on March 26, 1881, mounted on a splendid steed, as you remember by Earthman's testimony, was traveling north, and when at a country store, some eight miles from Nashville, became intoxicated, flourished his pistols, said his name was Tom Hill, and that he was a desperado and an outlaw, and tried to kill Earthman, who was then a justice of the peace. He was arrested on the spot—having besides his arms, a buckskin sacque next to his person, containing about \$1,300 in gold—and was lodged in jail at Nashville, charged with assault with intent to kill. An evening paper contained a description of the man arrested, and the remainder of the

gang made their flight the ensuing night. Frank James mounts a horse, stolen, though not by him, from Mr. Duvall, of Ray county, Missouri, and since recovered by the owner, as he told you, in Nelson county, Kentucky. Jesse and Dick steal horse flesh on the commons of Nashville; and when this is exhausted, two more are stolen as the three pass their rapid retreat to old man Hite's, the uncle of the Jameses, who lived some fifty miles north of Nashville, in Logan county, Kentucky, Frank James tells you from the stand—Mrs. Hite and her father were here, and he could not deny it—that he made this trip, but he was not a member of the gang, and did not want to go along. Oh, no! did not want to go; but the fact is, that with the four points of the compass and the wide world all about him, he did go. He wanted to go, gentlemen, and at every jump of his steed he cried out to the others as did Ruth to Naomi, "Entreat me not to leave thee, or to return from following after thee, for whither thou goest I will go, and where thou lodgest I will lodge." On the twenty-seventh day of March, about sun-up, Mrs. Sarah Hite and her father, Mr. Norris, say these men came to old man Hite's. The recently stolen horses had been turned loose, and Jesse, Frank and Dick came, one riding, two walking, two having guns, all having pistols. They stay a few days and go away; and in about two weeks come back again, four in the gang, Wood Hite being now with them as they prowl around. In a day or so they go to Nelson county, Kentucky, and are at Hall's, Hoskins' and other places. This is proven by the defendant's admission on the stand. This is the county from which, by the record evidence of the express companies and otherwise, it is shown these two guns were shipped, in May, 1881, to John Ford, at Richmond, Missouri.

Now, then, we come to the removal of all the gang, and the families of those married, to Missouri. Here, it is contended, all came but Frank. This is, because he is the one on trial. If Liddil were on trial, all would have come but him; if Jesse James, all but him. There is plenty of positive proof that Frank James came; but aside from this, the attending circumstances all show it. To begin with all the band to

which he belonged, Jesse James, Dick Liddil, Wood Hite and Clarence Hite, it is admitted, came. This is the gang as just recruited in Kentucky, and to which, by the testimony of Mrs. Hite and her father, Frank James more truly belonged than did the Hite boys. Shall the oldest and shrewdest man in the gang remain behind when boys like Clarence Hite came along? Shall fledglings be brought on a daring flight in search of prey, and one of the parent birds be left at home. All came in April and May, 1881 "except" the man on trial. Even Jesse James' wife with little children came, and took up her residence in Kansas City, Missouri, as shown you by the testimony of Thomas Mimms, her brother. Frank James' wife herself comes; and as it now turns out, comes first of all, early in April, 1881. It was hard in the outset to show by testimony independent of the gang that she came; but when we traced by the railroad records a sewing machine to Page City, in Lafayette county, Missouri, and from thence to her father's, at Independence, Missouri, the truth had to come, and Thomas Mimms tells you on the stand that he met her at the St. James Hotel, in Kansas City, and took her to her father's. The claim that she came to have General Shelby intercede for her husband with the Governor—long before the Winston and Blue Cut robberies, long before the reward of \$10,000 was offered, long before the Governor and local officers were working in unison, and in dead, hard earnest to rid the state of shame and outlawry—is a subterfuge, and too preposterous to be believed by intelligent men.

But positive proof that he came is abundant. It is just as clearly shown by disinterested witnesses that Frank James was at the home of the Fords in Ray county, Missouri, in May and in the summer and fall of 1881, as that he was at Mrs. Hite's in the early spring. I only mention one witness now, the one they did not attempt even to impeach, and whose testimony, all attorneys for the defense have striven to get away from as quickly as possible. This is the modest, intelligent, truthful, little Ida Bolton, of thirteen summers, and as nice a child in manner and deportment before you as



the daughter of any man who hears my voice. She is placed upon the stand by the state. She utters not a word, except in simple answer to questions asked. Leaving out the questions she testifies: "I know Mr. James over there; they called him Hall at our house—at Uncle Charley Ford's where I was in 1881. I knew him well; he came to our house in May, 1881, and was there several times that summer; he was upstairs a good deal and read. I know him and picked him out by myself from amongst all the men, when I came into court. He was at our house that summer with Jesse James, Dick Liddil, Clarence and Wood Hite. I know all of them. Frank James, Clarence Hite and Charlie Ford left our house for Kentucky, they said, in October, I think, 1881;" and a rigid cross-examination never caused her to waver in the simplicity of her truthfulness. Every man said—that is the truth. The defendant and his attorneys may storm and deny, but they can never get away from it. We read in the Scriptures of a little maid who lived within, or close by, a worse house for murder than that of the Fords—the house of Pontius Pilate, or of the high priest, I forget which. When the time for the crucifixion was drawing nigh, and all were deserting, Peter, the bold disciple, said he would stand by the Savior, to the last; but as he was warming himself by the fire, this little maid, who had probably seen him but once before, came along and said, "Thou also wast with Jesus of Nazareth," and he denied it; and the maid saw him again, and he said the same, and again he denied it and began to curse and swear. But it was the truth, despite his denial and profanity. So in this case the defendant may deny and swear and rave; but I tell you the little maid saw him, and with honest men he can never get away from her testimony. I say nothing now of testimony to the same effect by Thomas Ford, Cap Ford, Martha Bolton and Willie Bolton.

Having traced defendant by disinterested testimony, circumstantial and positive, from Nashville to Kentucky, and thence to the Ford farm in Ray county, Missouri, let us come to your own country. Here we find from this and an adjoining county twelve witnesses who testify to you that he

was here. They are all as honest, honorable and intelligent citizens as can be found anywhere. They say he was here in your vicinity about two weeks before, and on the day of the Winston robbery. They conversed with him, he ate at their tables, and they know him. Three of them, the Bray family, say they believe him to be the man, and the remaining nine swear to him without a doubt. One of them, Ezra Soule, swears positively that he saw Frank James just before sundown on the evening of the robbery, and within half a mile of the place. "Yes," it is said, "but that is just where the case falls to the ground; you prove Frank James to be there in the woods, but you can get him no further; you fall a half mile short in making your case." Gentlemen, were you put in the jury box as fools, as sticks, or as men endowed by Almighty God with noble reasoning powers? Jurors, I tell you, you are expected and required to use the common logic of the human mind, and when a conclusion follows with mathematical certainty by comparing one state of facts with another, it is your duty to adopt that conclusion. Otherwise there could be no enforcement of the law in criminal cases.

Five men placed with undeniable certainty in the woods there, and Frank James one of the five! Five men at the robbery, just as certainly as the light is coming in at these windows! Four of them admitted to be Jesse, Liddil and the two Hites—and then say, the fifth one may have been some other than the defendant? What became of Frank James when they left the woods for the train? Did he by omnipotent aid ascend Elijah-like into the skies, and some honest farmer come and act his part? and when the deed was done, did the Almighty let him down again into his saddle, and the honest farmer go home to his couch? Oh, no, gentlemen, he was there; and every one of you know it. The conclusion is logical, unavoidable, irresistible.

You will perceive, gentlemen, that I have arrived at this point in my argument without the mention of Dick Liddil's name as a witness, and without relying upon his testimony for any conclusion whatever. I have done so at a disadvantage to myself, for my custom is to strive to push all the

testimony along together, but I deemed it best in order to refute the oft-repeated assertion that "everything depended on Liddil," by demonstrating the defendant's presence at Winston without Liddil's evidence. But by the law of the land, Liddil is a competent witness; and I now propose hurriedly to discuss his testimony, bringing it along with the testimony of the other witnesses, but not in such manner, I trust, as to weary you.

Dick Liddil was a member of a band of train robbers, known as "The James Gang." This nobody denies. If he had not been, he could not have rendered the state the vast benefit that he has. When men are about to commit a crime they do not sound a trumpet before them. They do their work in secret and in darkness. Neither when they are forming bands for plunder or death, do they select conscientious, honest citizens. A man contemplating murder would not say, "come along, Mr. Gilreath, or Mr. Nance, and join me in my fiendish task." Their work is done when honest, law-abiding men are asleep, and "beasts creep forth." For this reason, when the state would break up a band of criminals, it must depend upon the assistance of one of their peers in crime to do it. Hence it is a custom, as old as the law, to pick out from a desperate band one of their own number, and, use him as a guide to hunt the others down. No honest, law-abiding man objects to this. When men go about where this is done, crying "perfidy," "traitor," "treason," you can put them down as the enemies of good government, or so steeped in prejudice that they know not what they do. Liddil, the least depraved man in the most secret, desperate band, perhaps the world ever saw, has thus been used; and the state has chosen, also to call him as a witness in this case. Mountains of abuse have been heaped upon him; the English language has been ransacked for terms of villification. Once, forsooth, and after he got to be a train robber, too, he was a splendid fellow; splendid enough to be the boon companion of so pure and great a man as Frank James. You remember that the defendant himself testified that Liddil, passing under an alias, was his guest, ate at his table, and slept under

his roof. Liddil was one of the heroes then, of whom we have heard so much. But suddenly he makes a change. He leaves the shades of crime and comes out into the sunlight of law and order; and all at once, strange to say, he is transformed into a "viper," a "villain," a "scoundrel," a "demon" of such "execrable shape" as his old tutor's counsel can give him. But let the attorneys for the defense go on with their abuse; it is a part of their business. I shall not retort by calling the defendant a "viper," a "perjurer," a "demon" and the like. Even the way in which Liddil comes into court is dwelt upon. To appeal to your prejudices by intimating that the United States, Frank James' enemy in 1863, was trying to convict him, Col. Philips says Liddil came guarded by a "United States marshal;" when the fact is, he came with Capt. Maurice Langhorne, deputy marshal of Jackson county, Missouri.

*Judge Phillips.* I did not say anything about a United States marshal.

*Mr. Wallace.* Possibly it was a slip of the tongue, but I insist that you did, and so did one of your colleagues; and it was followed up by your denunciation of Langhorne, who never opened his mouth as a witness, simply coming here in the performance of an official duty. It will surprise you, gentlemen, to know that Capt. Langhorne, who has thus been introduced to you, was for four years an officer with Gen. Shelby, the much-lauded witness for the defense. Thank Heaven, too, gentlemen, I can say for Capt. Langhorne, that he found out long ago that the war was over, and he is in favor of prosecuting and punishing train robbers and murderers, no matter who they are, or where they were in days gone by.

It is said Dick Liddil surrendered, and bargained with the governor of the state, and Craig and Timberlake, to convict Frank James, guilty or innocent, in order to obtain immunity for himself. I deny that. There is no proof of this, and I have a right, in answer, to emphatically and positively deny it. The only contract with Liddil was that always made with

those turning state's evidence, as we call it, namely, that he should tell the whole truth and nothing but the truth; and if he told a falsehood he did it at his peril, and the contract was ended. To say that these gentlemen would coolly bargain with a man to swear away the life or liberty of a fellow-being, guilty or innocent, is simply monstrous. The governor, their own witness, was on the stand; why not ask him about the contract? They did not dare to. Timberlake was on the stand; why not ask him? They did not dare to. Craig was here, subpoenaed by them; why not put him on the stand and ask him? Why let him go home?

*Judge Phillips.* There is no evidence that Craig was here, and I do not think it proper to bring it before the jury.

*The Court.* I understood at the commencement of Mr. Wallace's argument that all exceptions would be taken in writing. I do not know Mr. Craig, and can not say as to his being present.

*Mr. Wallace.* The records of the court will show that a subpoena *duces tecum* was issued by the defense for Henry H. Craig, and that he bring with him the written confession of Dick Liddil, made just after his surrender. In obedience to that subpoena, Capt. Craig sat for a long time within this bar. I know him, saw him, and talked with him. What a magnificent opportunity to contradict Dick Liddil—to show by his confession in writing he had sworn falsely. Instead of groundless declamation about the falsehoods Liddil has concocted since his surrender, how much better it would have been to ask the Governor, Craig and Timberlake about his conduct and truthfulness. Why not ask them if in any instance he had ever misled the officers, or told a single falsehood?

It is urged that Liddil has been contradicted by impeaching witnesses, but the effort to contradict him was a downright failure. They declaim mostly on the testimony of Gen. Joe Shelby, who says that in the fall of 1881, he met in Lafayette county, Missouri, Jesse James, Dick Liddil, Wood Hite, and Jim Cummings, on horseback, going south; and that he there learned from them that Frank had not been in Missouri for a long time, and of course was not at Winston.

I will be charitable enough to say, that had Gen. Shelby been fully himself, it is trusted he would not have so testified. I blame some of the attorneys more than I do him. You remember that during his cross-examination one of them twice arose and said, "the witness is in no condition to testify," and asked that he be excused for the present; but they had deliberately put him on the stand, and despite the storming of the witness at me—for which I care not a fig—I was determined they should not put a lot of questions, all written out by them, at him, and insist that he answer them just as written, and then dismiss him from the stand. I am not here to accuse a man situated as Gen. Shelby was, with false swearing—let gentlemen from the other side—

*Judge Philips.* Mr. Wallace, do you mean to say that I, as an attorney, would write out a false question and put it to a witness?

*Mr. Wallace.* The gentleman is getting excited. Not even the hint of the court to keep quiet is enough to curb his fiery spirit. I will be charitable enough with you, Col. Philips, to say that your client bade you write these questions. You know that I am telling the truth—that these questions were all written out, and that you had a contention with the witness before he would answer them at all. But Gen. Shelby is bound to be mistaken as to seeing these men thus, in the fall of 1881. The other evidence overwhelmingly shows it. He puts Cummings with them, when by the remodeled defense Cummings was not with the gang at that time at all. Besides, it is shown, by Mrs. Hite that Jesse James, instead of associating with Cummings after February, 1881, was hunting him to kill him on sight. It is further shown beyond question that the gang, after the Winston robbery, adopted the plan of walking as safer, and had no horses. Besides this, Tom Mimms says that Jesse James remained in Kansas City until late in the fall of 1881; he saw him continually; and when he left—he found afterward he went to St. Joseph—that he never went south that fall at all. Mrs. Samuels, too, swears that Jesse never went south for any purpose in the fall of 1881. But it is useless to say more. The contradictory testimony of Tutt, Joe B. Chiles, and the

marshal of Lexington, granting it true, is simply what you might expect from any man constantly importuned by hundreds of curious inquirers. Brosius can make the robbers on the cars "fifteen feet high and three feet through, with pistols having muzzles as big as your hat"—all in a joke; yet Liddil, besieged to answer by a thousand persons, can not put a man off but it must be construed into a contradiction.

Let us now examine Liddil's testimony, not him, but his testimony. If any one of you is prejudiced against him—and I see no reason why you should be, for you have certainly seen no more candid, straightforward witness—look at his testimony, not at Liddil. Scrutinize his testimony, and let it stand or fall on its merits. If the judge of this court should hand me a glass of water, and Liddil should also hand me one, if I felt squeamish as to whether the contents of the two were equally pure, I would proceed to examine the water, mainly, at least, and not the man. But your mind suggests "you could analyze this by chemical formula and apparatus and see whether or not it contained poison." So you can, with equal certainty analyze the testimony of Liddil in this case. The formula is contained in the eighth instruction, to which I said, when on that branch, I would call your attention in discussing the evidence. By this, if you are in doubt after listening to the bare statement of an accomplice, upon which alone you may convict, then you call to your aid your formula; and the test is corroboration or no corroboration. If corroborated by other truthful witnesses, you are bound to believe his testimony. Let us, then, standing here in the great laboratory of the law, make a chemical analysis of Liddil's testimony, and see if every time the test of corroboration is applied to the glass of water he had handed you, it does not bubble and sparkle with the truth. And at the outset I say to my friends on the other side, find me a case in your practice, find me a case in the books, find me a case in the history of trials, where an accomplice has been so wonderfully corroborated as this man Liddil.

Liddil says that for some time before coming to Missouri they all lived in or near Nashville, Tennessee; that Frank

James went by the name of B. J. Woodson, Jesse James as J. D. Howard, Bill Ryan as Tom Hill, and himself as plain Mr. Smith; and he is corroborated as to every word by Earhman, Moffit, Horne and Sloan. He says that on March 25, 1881, Ryan was arrested, and gives particulars; and Earhman corroborates him in full. He says they all lived in Nashville in March, 1881, at 814 Fatherland street, and disappeared about April 1, 1881; and John Trimble, Jr., who rented "B. J. Woodson" the house, and James B. May who purchased the same, came with books and dates, and corroborated him in detail. He tells you that he, Jesse, and Frank, on Ryan's arrest, fled to old man Hite's, in Kentucky; and Mrs. Hite and her father, Mr. Norris, corroborate every sentence he utters. He says they then went to Nelson county, Kentucky, and shipped guns from Adairsville, in that county to Missouri—what a fine chance to contradict him, if untrue, by the express books; but N. G. Bishop, at Lexington, Missouri, and the agent at Richmond, Missouri, show you by their books that a box came, just as Liddil says, to the first and thence to the latter town, directed to J. T. Ford. He testifies that the families of the Jameses then came to Missouri, giving dates and surrounding circumstances, and he is corroborated by other witnesses; that he, Jesse, Frank, and the two Hites came to Missouri; and all is admitted, except as to Frank, and here he is corroborated in a dozen ways; that Frank James' wife came to Shelby's with a sewing machine, thence to Kansas City, and thence to her father's; and Geo. Hall, of Page City, Dan Bullard, agent of the Mo. P. R. R., at Independence, Missouri, and Thos. Mimms corroborated him at every step, with dates and records. He says that Frank James and the others of the gang were frequently at the Ford farm, in Ray county, Missouri, in the spring, summer and fall of 1881; and old man Ford, up to the time he clashed with the matchless James, as good a man as Ray county had, Cap. Ford, Martha Bolton, Willie Bolton, and Ida Bolton come on the stand and testify that Frank James was there, and corroborate him in a score of details. But just here I am tempted to pause a moment.



The Fords are abused and defamed by the hour by defendant's counsel. Once they were most respectable citizens of Ray county, entertainers of chivalric knights; but now their house is called a "robber's roost," where guests are murdered and buried in the night "unshrouded and uncoffined." As if you were friends sitting weeping on the tomb of Jesse James, the question was put to the Fords as occasion presented "are you the father," or "the sister," or "the brother" "of Bob and Charlie Ford who assassinated Jesse James?" If the house of the Fords was a most disreputable place, who did as much to make it such as Frank and Jesse James? If it was a robber's roost, with devouring vultures sitting on the limbs, what were Frank and Jesse James when they congregated there with the younger birds? By whose counsel, example or encouragement, were all the young members of this band induced to join it, and to give themselves over to lives of shame and bloodshed? Who but Jesse James induced Dick Liddil to leave the vocation of a farm hand in The Six Mile, in my own county, to be a bandit and a train robber? Who but Jesse James took Bill Ryan from his little home, there on the Blue? Who made of him an outlaw and a desperado, until he fills a felon's cell, and his widowed mother an untimely grave? Frank and Jesse James. Who led Wood Hite along the slimy way of vice until he perishes from his own viciousness, and is tumbled into the ground without a tear, and without a shroud? Frank and Jesse James. Who took the green, "gangling" boy, Clarence Hite, from his home in old Kentucky, rushed him along the path of robbery and murder, until he fills a convict's cell, and a convict's grave? Frank and Jesse James. Who taught the Ford boys to kill for money? Jesse James. I am not here as a defender of the Ford boys. I have nothing but condemnation for their method and their motive in slaying the bandit king. But neither he, nor his admirers, can be heard to complain. He fell at the hands of his pupils, and according to his own methods. As the old eagle to teach her young to brave the winds in search of prey, bears them upon her wings from off the craggy cliff, and trains them

above some serging vortex in the sea, so did Jesse James hold the Ford boys above the black vortex of crime, and train them for robbery and assassination. Well might the poet say of his fall, as he did of the eagle, struck down in his flight for prey, by the aid of a feather dropped from his own wing,—

So the struck eagle stretched upon the plain,  
No more through rolling clouds to soar again,  
Viewed his own feather on the fatal dart,  
And winged the shaft that quivered in his heart.

Keen were his pangs, but keener far to feel,  
He nursed the pinion that impelled the steel,  
And the same plumage that had warmed his nest  
Drank the last life drop from his bleeding breast.

Farewell, Jesse James, prince of robbers! Missouri cries a long, a glad farewell! Cruellest horseman that ever wore a spur or held a rein, seeming oftener like death himself on his pale horse charging through the land, than feeling man, farewell! farewell! Foulest blot that ever marred the bright escutcheon of a glorious state, farewell! farewell! Yes, thou bloody star of murder, hanging for years like a thing of horror in our very zenith, frightening science and civilization from our borders—I condemned the manner of thy taking off, yet I could but join the general acclaim, when, seized with the shock of death, we saw thee reel in thy orbit, and then plunge forever into old chaos and eternal night.

But while I talk thus of Jesse James, I will deal more justly and tenderly with his memory than has his brother now on trial, and those of his kindred who have come as witnesses to screen him from his crime. I will not desecrate a dead man's memory and heap additional infamy upon his widow, and children after his voice is hushed in death. Missouri's sunshine and showers will kindly nourish such flowers as the widow of Jesse James may plant upon his grave, and so will I. Let it remain for brother and kindred to go thither and scald their lives out by pouring upon them the hot blood of McMillan, shed by Frank James at Winston.

Possibly I have followed my defending brothers in their

far-fetched attempts at sympathy or prejudice farther than I should have done. Let us return and take up Liddil's evidence at the house of the Fords. He says the defendant was frequently there in 1881, and all the Ford family say the same. Frank James made these people his associates; they are at least as good as he; they are his peers, and let him stand by their testimony.

We have now come to the preparation proper for the robbery. I will omit the procuring of horses, in which Liddil is corroborated in every item. He says, with the Samuels' homestead and the Fords' as headquarters, they made three trips in search of a train to rob. The first trip to Chillicothe I will omit. The details are given by him, but the defense fails to contradict him at any step. The other two trips were both made to your own county, one about two weeks before the robbery and the last when it was perpetrated. The corroboration of these two trips is wonderful. You can actually trace the band through and back again without his testimony.

Take the first trip: Liddil says he and Frank got breakfast at a house in your county—which he so minutely described that you know it is Mrs. Frank's, and Mrs. Frank corroborates him; that he and Frank James then went a few miles to a blacksmith shop to have Clarence Hite's horse shod, and Jonas Potts corroborates him—picks Liddil out here on the street during the trial, and identifies the defendant; that they then started back, staying all night at Wolfenbarger's, describes the house, barn, family, tells of Jesse being sick here, helping to load wood, etc., etc., and Wolfenbarger identifies both him and Frank James, and corroborates him in every detail; that they then passed on to a place and got dinner, and Jesse was taken to town in a buggy, describing surroundings to you, family and everything, and the Brays come and corroborate him in full. This was the first trip. I have not given half the minutiae; you remember them; he was contradicted in nothing. Look at the trip when the crime was committed. He says they rode from Mrs. Samuels', starting at the usual time, good dark, and rode about

all night—five of them on five horses. He describes these horses, and your best citizens come and describe them just as he does. He says that on the day after starting, as they came they separated, Frank and Clarence turning off slightly to one side, and the balance to the other, and minister Machette—just in the right neighborhood—picks out Frank as being at his house with a tall young fellow for dinner just at this time; that they came and camped at night in the woods, just about a mile from Gallatin, so describing two houses close by that any citizen could go at once to the place; that on this trip Frank and Clarence went to the same blacksmith shop to get Frank's little bay mare shod and Jonas Potts, Mrs. Potts (his wife), Wash Whitman and 'Squire Mallory corroborate him, and identify the defendant; that when they broke camp in the woods, near Gallatin, on the morning of the day of the robbery, they separated, Jesse and Wood going together, Frank and Clarence together, and he (Liddil) by himself; and thus, taking different routes, they went from here to the appointed place of meeting in the woods, close to the scene of the crime; and in making this trip, about nine miles, all loiteringly, he got his dinner at a little house, describing it "where they had a blind girl," and Mrs. Kindig and her daughter say this was their house, and corroborate him in all details, and say they picked him out since the trial in crowded Gallatin as the man; and sure enough, we find them thus separated, for Ezra Soule says he saw Frank at this place of meeting in the woods, and describes Clarence as with him; and Mrs. Montgomery and her daughter put Jesse and Wood, by accurate description of them and their horses, bays, at their house for supper. He says they then went from this place in the woods and committed the robbery, and tells all the details as to the manner of its being done; and those on the train corroborate him in every particular.

After the robbery he says they went to the Fords' and Mrs. Samuels', and tells as to the turning loose of the horses; and in all he is corroborated, for they are found and the owners get them back. He says they stayed on this side of the river for some weeks, and then bought a wagon from Mrs. Sam-

uels, hitched his horse and Charley Ford's pony to it—Charlie joining the gang, as is conceded, after the Winston robbery—and crossed the river at Kansas City, one of them having on women's clothes as they went over the bridge; and separating in Jackson county, the wagon was left at J. W. McCraw's, in the Six Mile, and his horse returned to Lamar-tine Hudspeth, from whom he purchased it—and the Samuels family corroborate him as to everything except that the living James was along, and McCraw as to the balance. He is finally fully corroborated as to the time and manner in which Frank James left Ray county for Kentucky, in October, 1881, by Ida Bolton and the balance of the family, and by Mr. Hughes, a banker at Richmond, who says he believes Frank James to be the man he saw taking the train at this time. While listening to gentlemen for the defense, I counted fifty-six material instances in which Liddil is corroborated, and I could have extended it to a hundred or more. With all these details, he is not contradicted in a single instance. It is only contended he is in two places. One when Liddil, in describing a house close to Gallatin, said he "thought it was a two-story white house;" and witnesses are actually put on the stand to show it was "a story-and-a-half white house." What a miserable effort to break a man down, who is describing scores of places he never saw before nor since. The other contradiction is only attempted by one attorney, Mr. Slover. He says Liddil says there were five men at Bray's, and the Brays say four. But even Mr. Slover's associates, and every reporter in this trial, will bear me out that Liddil said Wood Hite had gone back on the train, and that Jesse, Frank, Clarence and himself were at Bray's.

This is Liddil's testimony. He was cross-examined for hours without ever varying from his testimony in chief, in a single instance. In the very nature of things it is bound to be true. No man could manufacture such a story, carrying it along with hundreds of details over a distance of sixteen hundred miles, without contradicting himself; much less, have scores of witnesses come in and corroborate him at every point. No man could put an innocent person in an ex-

pedition like this, on different horses, at dozens of places, sometimes alone, sometimes with all the band, sometimes with one other, on trains, in houses, with families, in the woods, under all the varying vicissitudes, covering five months of time and a distance of sixteen hundred miles,—and then be rushed through a searching cross-examination for half a day without an error. He could as easily perform a miracle. The state has simply taken Liddil's statement and drawn it together link by link, and then invincibly forged each link to its fellow, by corroborating testimony, until we have an unbroken and unbreakable chain stretching from Nashville to Winston. We sometimes follow the streamlet making its way feebly but unbroken down the mountain-side, but after a little another streamlet meets it, then another and another, until at length, a resistless torrent, it sweeps on to the plain beneath. So the evidence, taken as a whole, gathers and strengthens in this case. So ultimately, like a torrent, it sweeps along, bearing upon its surging crest all the "banners" and "flags," prejudices and technicalities with which the defense have striven to resist its flow.

The strongest, yet far shortest, part of the evidence is yet to be examined. This is the testimony of twelve conscientious, intelligent witnesses, who identified Frank James as one of a band seen in this section about the time of the robbery of this train. Most of them, without any assistance, have picked Liddil out from the crowd of strangers on the street here since the trial, and identify him as easily as they do Frank James, though not a peculiar man in appearance, as is the defendant. Neither the reputation nor intelligence of these witnesses can be attacked, for they are all splendid citizens. Something must be done; and wandering as far from the testimony as Neptune wanders from the Sun, each lawyer for the defense makes a witness out of himself, and cites numerous instances of mistaken identity from the books, and other instances which they assure you they know about themselves, until they would reason you into the conclusion that there is no such thing as identification. To listen to them, you could not swear to one another a year hence. Hav-

ing been housed up here for two weeks, you will fail to identify persons living along the road to town, as you return; and will not know beyond a doubt your wives and children when you reach your homes. Such a doctrine as they have sought to instill into your minds is simply monstrous. It is contrary to all human conduct and experience. We act upon the law of faith in what other men see, every day of our lives. All history is founded on what others saw, and bear witness to. The Christian world today, containing teeming millions of human beings, in considering the fate of the immortal soul—the profoundest topic presented to the mind of man—is resting its faith upon a simple question of identification. The religion recognized by the laws of this nation, and which required you to take an oath to our God at the outset, hangs upon the testimony of twelve plain witnesses as to the miracles and identity of a risen Savior. Paul, the greatest of these witnesses, and one of the most logical and towering intellects the world has seen, based all his hopes for eternity on a single sight of the risen Lord.

The testimony of our twelve witnesses is as follows: The first three witnesses are William Bray, his wife, Mrs. Bray, and their son, R. E. Bray, well appearing, intelligent people, living, as you remember, where the four came for dinner, and Jesse James was taken to town sick. They all describe Frank James with his burn-sides, and testify that, to the best of their knowledge and belief, the defendant is the man. You remember Earthman, of Nashville, says Frank wore long, full, lightish whiskers in Nashville; and Liddil and all the Ford family say he had pretty long burn-sides, this summer, having shaved the chin.

4. The fourth witness was Jonas Potts, the blacksmith, who had two good opportunities to see Frank James; and he identifies him and testifies positively that he is the man. He picked Liddil out in a crowd, and singled out the little bay mare in a livery stable in Liberty and recognized her shoes as his workmanship; why can he not as well be abso-

lutely correct in identifying Frank James, confessedly one of the most unusual men in appearance in the country.

5. Mrs. Jonas Potts saw Frank and Clarence at her table at breakfast—says Frank called the young fellow with him Clarence; and she tells you she has no doubt about this being the man.

6. 'Squire Mallory is one of your oldest and most intelligent citizens. No man can breathe aught against him. He tells you he realizes a man is on trial for his life, but he saw this defendant at Pott's shop just before the robbery, and is so positive of it he has no hesitancy in swearing to it.

7. Wash Whitman shows by his appearance and demeanor that he is a most excellent and sensible citizen. You know I am not saying more for any of these witnesses than they deserve. You could not select better persons in your thriving county if given your own time for the task. Whitman says he was at Potts' shop at the same time 'Squire Mallory was, and to use his own words, says: "I am as confident as I am of anything this is one of the men I saw there. If I had any doubt about it, gentlemen, I would not say so." Whitman was a most sturdy, honest-looking fellow; and the defense as good as said, "That's the God's truth" by not venturing to ask a single question in cross-examination.

8. Mrs. James Frank, you remember, is the lady at whose house two men got breakfast before going to Potts'. She says positively Frank James is one of the men. All of these witnesses, you remember, also describe the defendant in the same way as to demeanor, clothing as far as they can recall, and say he had lightish burnside, or, as some termed it sideburns.

9 and 10. Frank Wolfenbarger and his sister, Mrs. Charlotte Lindsey, are wide-awake, industrious, well-educated young people. They testify that defendant stayed all night at their house at the time Liddil says they did, and they have no question as to his identity. Each of them identified the defendant positively the first look they ever got at him.

11. Ezra Soule is a somewhat peculiar old gentleman,



perhaps, as the defense claims, but his curious, inquiring turn makes him all the better witness. He says he was hunting blackberries in the woods and ran across Frank James; took him and his partner to be horse-thieves, and talked with, and watched them especially on this account, and testifies that this beyond question is one of the men.

12. Rev. Mr. Machette, a minister of the Christian church, is a gentleman of considerable culture and extraordinary memory. He notices minutae like a woman. He tells you that a few days before the Winston robbery two horsemen were at his house for dinner. He charged nothing, but they paid anyhow. He says that he is so sure that Frank James is one of the men, that had he charged for that dinner and met the defendant yesterday in the road, he would have presented his bill without hesitation; that there can be no doubt about his being the man. After relating both on direct and cross-examination, what occurred while the horses were being fed, when the call was made for dry feed (for a long ride, etc.), he says they went into the house, and Frank James, noticing he had a library, began to talk books. In an effort to find out something about his mysterious visitors, Machette asked questions as to their acquaintance with towns lying south of him, and was puzzled with skillful evasions. Once, in answer to a question about who he knew at a small town, the defendant said: "What do you think of Bob Ingersoll?" Finally the defendant, he said, got to Shakespeare, and after passing encomiums on this great genius, arose and recited extracts from his plays (the slouchy Sphinx, alias Wood Hite, alias Old Grimes, no doubt). A man, gentleman, may change the exterior of his person, but he can not change the complexion of the mind within. This is a most remarkable mental characteristic for a western bandit. To say that it is nothing uncommon for a train-robber to go through the land spouting Shakespeare is preposterous. There is no getting away from the identification furnished by Mr. Machette. "It makes assurance doubly sure." Dr. William E. Black, one of your best citizens,

testifies that since Frank James has been in jail, he had a long conversation with him, in which he talked much of Shakespeare, and of his plays, naming, I think, Macbeth, Richard III, Hamlet, and others; and passing his opinion on Barrett and others, whom he said he had had the pleasure of seeing. The nail was driven through by the other witnesses, but the testimony of Machette and Black, taken together, rivet forever the identity of this defendant. This completes the evidence for the state—abundant, conclusive, irresistible.

What is the defense? To meet such overwhelming proof on behalf of the state, an unprejudiced mind would naturally say it ought to be honest, genuine, complete. What is it? Any honest defense, known to the charge of murder—self-defense, insanity, an alibi? They are actually ashamed to name it. Judge Philips says, "I don't know what you would call it." Mr. Glover's definition would do credit to some of our modern scientists. "It is an alibi whose strength consists in its weakness." The fact is, gentlemen, it is an attempted alibi; but to sensible men so transparent a dodge that they are ashamed of it. The attempt is to show that Frank James was in Texas and not at Winston, in the state of Missouri, on the fifteenth day of July, 1881. Every witness brought to show this is a member of the family; Mrs. Samuels, the mother of defendant, John Samuels, his brother, Mrs. Palmer, a sister, and Palmer and Nicholson, brothers-in-law, and defendant himself, are the witnesses. Mrs. Samuels is a mother testifying for her son. She says he was not at her house in 1881. I am not going to abuse her. Her testimony is contradicted by near a score of absolutely disinterested witnesses. She is bound to have known Jesse and his band were robbers and plunderers, and yet she willingly fed them all; and readily said on the stand: "Yes, Mr. Wallace, I furnished them a dress when they went off in the wagon; I did this so you officers over there could not catch them." Would she not shield Frank from the law as quick as she would Jesse—now the scape-goat of all the sins, it would seem, of both. Take her testimony, gentlemen, together

with Judge Phillips' eulogy, and give it the weight you know it deserves. Mrs. Palmer is a sister testifying for her brother on trial for his life. I am going to leave her, too, without any abuse, or criticism even. No sadder sight is ever seen in life than a woman put on the stand as she was. You know that Frank James was not at her house in the summer of 1881, as she says. I will say this for her: she seemed to appreciate her terrible situation on the stand, and to feel relieved when the awful task was ended.

I can not say as much for her husband, Allen Palmer, of Clay county, Texas. He travels a thousand miles to utter a single sentence: "I worked for a railroad in the summer of 1881, and when I came home in August, Frank James was there." This is all; and his mouth is closed as with the grip of death. He is one of those alibi witnesses seen quite often in our courts, who bobs up and swears to one single fact, and then falls back forever into the oblivion of forgetfulness. He knows it was 1881 when Frank was there, because he, Palmer, worked for a railroad. On what part of the road, Mr. Palmer? Can't remember. For what contractor? Can't remember. For what boss? Can't remember. Give name of any men working with you or near you that summer? Can't remember. Was your name on the pay rolls of the company? Can't remember. Of course not; we might examine the rolls. Who did you board with? Can't remember. Give the name of any man who paid you any money, or who saw you there? Can't remember. No man who heard him was fool enough to believe a word he said. What a contrast between Liddil and Palmer—between open truth and skulking error.

John Samuels defendant's half-brother deserves scarcely a mention. Every attorney for the defense stamps his testimony as false. For twelve hours they have exclaimed, at the top of their voices, that the band beyond question was composed of only four men, Jesse James, Dick Liddil, Wood and Clarence Hite—and turn their backs in scorn on John Samuels who named these four, and also Jim Cummings.

His evidence does but one thing, and that is to show the impossibility of Liddil's putting an innocent man in the gang and tracing him through such multiplied and changing vicissitudes; for you remember when Samuels was put on the stand, doubtless for the express purpose of putting Cummings in the band, he left him out twice in naming the gang, and then only put him in in answer to a most leading question; and Mrs. Samuels the very first time she tried it made exactly the same mistake.

For Thompson Brosius, who testifies he was on the train and thinks Frank James is not one of the robbers, a man has nothing but astonishment and sympathy. He has been visiting James in jail until, in pursuance of a maudlin sympathy, he has possibly brought himself to think he is not the man. The truth is, like Major McGee and every other witness on the train, he knows nothing about who it was. Ten or twelve of the best citizens in Gallatin come before you and impeach Brosius in a most terrific manner. To some he said he was so scared that "the men looked fifteen feet high, and their pistols four feet long, with muzzles as big as your hat," and "he would not know them if he saw them." Those in search of an accurate description went to him, and he said he could actually give none; and to add to his pitiable plight as a witness, his own brother-in-law and partner takes the stand and says Brosius went to see the defendant since his being placed in jail, and came back and said he "could not say whether James was one of the men on the train or not—could tell nothing about it."

The only witness for the defense whose evidence is worthy of consideration is the defendant himself. And what a failure he made. You never saw a poor wretch caught in the very act of theft who did not go on the stand and tell a more reasonable story. To those unaccustomed to such things he recited his story on direct examination with some plausibility. He admits he went into Kentucky, but there he was constrained to leave the boys, after imploring them in the name of his mother, and all that was holy, not to come

into Missouri. This was, you remember, in the spring of 1881. He then went, he says, to Louisville, thence to Memphis, thence to Denison, Texas, and thence to his sister's, in Clay county, Texas. In this last section he remained most quietly until September 9, 1881, when he left and went to Kentucky and met his wife, thence into Virginia and North Carolina. The cross-examination comes. To understand this entire evidence you must reflect that when he said he went to Texas, no effort was being put forth to capture the band, and that the pursuit commenced in terrible earnest after the Winston robbery of July 15, 1881. The latter part of his testimony as to going into Kentucky, Virginia, and North Carolina, was doubtless true; and knowing he would delight to corroborate himself, I first went over this ground with him—all subsequent to the robbery and when the band were falling one by one in the hot pursuit. He gives the towns he visited in Kentucky, gives exact dates, describes hotels, and gives aliases under which he registered. No man could ask more. He goes into Virginia, and does the same in a number of instances and does as well in North Carolina. He then comes back into Virginia, and at Lynchburg, where he says they lived, he describes their house, from whom rented, where they bought groceries, and gives names of citizens who saw them. This was splendid. All at once, however, we change, and he is asked now to go over his trip to Texas, covering the time of the robbery, and give details as on his trips through Kentucky, Virginia, and North Carolina; and alas! our light goes out, and we at once sit down with him and Allen Palmer in eternal oblivion. Not a single hotel can he name or describe from Louisville to Clay county, Texas. Not a single place where he registered from April to October, 1881. He finally mentions just one man he saw during this whole time, at Denison, Texas, and he absolutely refuses to give his name. A man with scores of details, on a trip in the fall of 1881 and winter of 1882, when no crime for which he is charged is committed, can not get outside of his own fancy to give a corroborating

straw as to his whereabouts in the summer of 1881, when this train robbery and murder was going on in Missouri.

It is idle to talk about such testimony. Frank James was at Winston engaged in robbery and murder. Every man on this jury knows it. God and his angels know it.

We have now, gentlemen, examined the law and the evidence. One would suppose that in a court of justice, where remarks must be confined to the law and the evidence, my task was ended. Yet I should fall far short of my duty to the state of Missouri, if I sat down without noticing some extraneous appeals that have been ingeniously made to you for the acquittal of this man, and upon which some of the attorneys laid far more stress than upon the law or the evidence.

Frist the appeal is made that Frank James ought to be acquitted because he "surrendered." When ordinary men place themselves in the hands of the officers—as they frequently do, and are often convicted, too—we say, "he gave himself up;" but when Frank James places himself in the hands of the officers, his attorneys continually talk to you about it as if they announced the close of some great war, in the "surrender" of the last chieftain—but let the term be used for what it is worth. Judge Philips says that because he came in and surrendered he ought not to be prosecuted.

*Judge Philips.* I said no such thing.

*Mr. Wallace.* You said it in substance a dozen times. Your speech was full of wails about the "persistency" and "revenge" "of this prosecution," after the defendant has "surrendered." You want him prosecuted right easy, then; right easy, which is worse. A milk-and-cider prosecution is worse than none. The term "surrendered" was used hundreds of times by opposing counsel during the twelve hours consumed by them in argument, oftener than any other except the word "chivalry." "Surrendered!" Frank James "surrendered!" When did he "surrender," gentlemen,—

when, I ask? When, as the last one of the band, he was left helpless and alone, and the messengers of the law were hot upon his track; when Jesse James "slept the sleep that knows no waking;" when Bill Ryan's pistols had been taken from him and he was held in the iron grasp of the law; when Jim Cummings had fled forever from the deathly vengeance of Jesse James; when Wood Hite, awfully shrouded, slumbered in his awful tomb, and the green grass of Kentucky was springing upon the grave of Clarence; when Dick Liddil and Charlie Ford had come in, and the officers, fully informed, were pressing swift upon his heels; when a ten-thousand-dollar reward, like a vengeful Nemesis, hovered about him by day, and stood like a horrid spectre beside his couch by night. And now, having fled from the terrors that beset his path, and given himself up, we must all join in one general acclaim, and he must be acquitted because he "surrendered." Now, that the storm of the people's wrath has blown so hotly across the crimson sea of murder upon which he launched his boat in 1881, and the lightning played so fiercely, and the waves dashed so high, that like an affrighted, tempest-tossed pirate, he has rowed his way hither to the shores of civilization, we all forsooth should meet him on the beach, and with waving handkerchiefs and loud hurrahs conduct him, like a returning Caesar, in triumph through the land; charming ladies should flock about him as if to kiss his hands, and make their lips the redder and their cheeks the rosier; counsel should only speak of him with becoming reverence; the judge upon the bench should twist the law to suit his case, and jurors in suppliant homage should bend their oaths and issue a pardon to him without leaving the box. In the name of justice, gentlemen, I beseech you to stand by your oaths! You have no right to pardon this defendant, for the pardoning power, under our system of government, is lodged elsewhere than in the jury-box. Such appeals as counsel have made to you might in the earlier times, have been made with propriety to a Greek or Roman jury, for they could lawfully pardon one on trial;

but what was proper performance of duty with them might be perjury in an American jury.

Again, you are most cunningly urged to acquit because the defendant was a soldier in the "lost cause." Your sympathies and prejudices are continually appealed to in this behalf. In the opening statement for the defense, before they had even introduced their evidence, the counsel boldly told you, that you, yourselves, would remember some man, naming him, an ex-confederate, who at the close of the war returned from the army to your county here—as his client fain would have returned to his county—and was shot down like a dog. He even went away from your county, and named some returning confederate soldier who was similarly shot down on the streets of Lexington, Missouri. Governor Johnson once, or more, referred to the defendant as having been a "gallant soldier;" and any number of times you heard from them the expression, "a soldier with Gen. Shelby." But the climax was reached when Judge Philips, in speaking of the surrender of the defendant, said, that when he saw that Frank James had handed his pistols to the Governor of Missouri, he was surprised that the whole matter was closed up so quickly; was astonished that in twenty short years all the "bitter animosities of civil strife were ended;" in plain English, gentlemen, that the surrender of Frank James is to be taken as the end of the "lost cause"—that the "lost cause" wound up in pillage, plunder, train-robbery and murder. Gentlemen, when he said that, I thought I heard Robert E. Lee, Stonewall Jackson, Sterling Price, and all the gallant host of southern chiefs who slumber by them, roll over in their graves and murmur "no," "no," "no." Yea, I thought I saw every confederate graveyard throughout the south, yawn in an instant, and each and every sleeping soldier come forth in battle garb from his narrow home, and all shout out in clarion voices "no!" "no!" "no!" And even as they went back, like receding ghosts, I still heard them shouting, "no!" "no!" "no!"



Judge Philips talks to you about the confederate flag, or, as he puts it, "Frank James' flag;" "my flag went up; Frank James' flag went down," and so on. Why unfurl the old confederate banner here? We hear the drums beating; we hear the hoofs of horses prancing; we see the sabers gleaming; we see the old banner floating in the sky, and beneath it we behold, dashing into shot and shell of battle, as honest, gallant, and conscientious a host as ever fought and bled on glory field; and when at last—repulsed, riddled, conquered—they lost the day, we see them lay down their arms, and with tearful eyes, nearly twenty years ago, fold the tattered old banner and lay it away forever to rest, and each soldier depart for his home with the language of their poet laureate on his lips,—

Furl that banner, for 'tis weary,  
Round its staff 'tis drooping dreary;  
Furl it, fold it, let it rest.

But it remained for one of Frank James' counsel, near a score of years thereafter, to unfurl that banner before a jury in a court of justice, and to ask them to heap insult, upon it and upon all who bore it, by besmirching it with the fresh blood of McMillan and Westfall, and rolling up and hiding beneath its honest folds the paltry plunder obtained by hellish robbery and fiendish assassination at Winston. Will you acquit the defendant and do it? God forbid.

*Judge Philips.* No such statements as you have been repeating were made directly or indirectly.

*Mr. Wallace.* I took your language down, and appeal to every man who heard you, to say if I am not correct. You are interrupting for the sake of interruption. You had four hours yourself and now you are growling all through my speech. You are like an old setting hen—cross both off and on the nest.

Again, it is adroitly urged that the defendant ought not to be held strictly accountable for this crime, because, if done by him, it was done in just revenge. Possibly some juror says

"there is something in that, too;" we will see. Gov. Johnson, you remember, said, "possibly the defendant could not live here and lead a quiet life after the war." I give his words in substance. All through the speeches for the defense this idea was evolved in divers ways, namely, that the acts of depredation committed in Missouri since the war were done in pursuance of a just revenge, or such a revenge as would naturally cling to the human heart. The hardships of the defendant and the "bad treatment" of the family of Mrs. Samuels, could have been held up in glowing colors by Col. Philips and others for no other purpose. Of course they do not admit nor do I insinuate that the defendant had anything to do with these acts. But by whomsoever committed, I deny that revenge had anything to do with it. Money, money, money has been the ruling motive every time. As so much has been said about this, go back in memory over every daring bank robbery and train robbery committed, from the Alleghanies to the Rockies, since 1866, and see if former friend and foe have not both suffered; and see if for every drop of human blood that has been shed, there has not been a corresponding shining dollar in the murderer's pocket. Oh, no, gentlemen, this is all a pretext. Money, not revenge is the demon that has wrought this woe.

Lastly, and chiefly, you are urged to acquit on the broad ground of chivalry. Here the pyrotechnics of the orators played in reddest splendor, and such expressions as "no man with a spark of chivalry in his bosom," and a hundred kindred others, fell about you in great profusion. The man of chivalry, with his deeds of daring, was dressed up in shining, fiery apparel, and held up in glory to your enraptured view. Gentlemen, every man extols a noble, unselfish, daring deed; every man admires genuine bravery; and I believe I can go in admiration along the line of chivalry as far as any man alive. Bring forth your soldier, stern, cruel, and powerful as an ancient, giant warrior; give him shield and helmet and two-edged sword, and in time of war lead him forth to battle, and let him deal death and slaughter right and left till the air is full of moans and his track is thick with dead and dying,

and before I have thought I have followed him with admiration at every step. In time of war equip your horsemen; give him torch and glittering blade, and let him dash into the land of the enemy, spreading fire and desolation along his way, and plunge into the ranks of the foe until blood flows up to the bridle-bit; and when he is done, while I have condemned his horrid work, I have applauded his valor at every bound of his steed. We have all found within us a disposition to dwell in admiration on deeds of blood and daring, as when we hastily left the page of history, where we found recorded the bloodless wonders of the Holy Land—where olive branches grew, and shepherds watching their flocks by night heard angels chanting in the skies “peace on earth, good-will to men;” and turned to dote on the blurred and bloody page of Rome, the military academy of the world, and oftentimes its human slaughterhouse; to follow the victorious eagle soaring above the crushed-out lives and liberties of nations; to stand with the noisy rabble and watch the triumphs of Roman generals returning from gory conquest; or sit and gaze on the dread arena where man and beast, or man and man, struggled in deadly combat to amuse the cruel crowd. But there is a length to which we can never go—a boundary line lying between bloodshed in war, or from necessity, on the one hand, and bloodshed for money on the other, which the human heart in all its admiration for chivalry will never cross. Seventeen years have rolled away since the last alarm of war was sounded; a great nation is intently engaged in honest toil, and the whole land, from one end to the other, is wrapped in the sweet embrace of peace. A pioneer axman, with the sweat dropping from his brow, is felling his tree in a western forest; and an idler, armed to the teeth, steals upon him, shoots him down and rifles his pockets for money. Or, as in the case now on trial, a noble train is steaming across a western prairie; it is a summer’s night, and the hush of peace is bounded only by the silent stars above and the voiceless dewdrops on the earth beneath; a band of outlaws comes sneaking forth from the woods, attack the train, shoot down unarmed, unsuspecting men, all for a few

miserable dollars in money—and before I am through the human heart and brain are exclaiming, “There is no chivalry there! that is murder—cold, cowardly, foul as hell!” Call such work bravery if you will till the tongue is tied, but there is no bravery, no chivalry about it! There is no chivalry that goes beyond the rule laid down by that immortal poet whom Frank James seems to have read so much, and whose injunctions he should have heeded—

I dare do all that may become a man;  
Who dares do more is none.

Gentlemen of the jury, I have taxed your patience long enough and will close. However much you may sympathize with the defendant or his family, the evidence for the state is absolutely conclusive, and must sweep from your minds every doubt as to his guilt of this crime. I have striven to perform the task assigned me as best I could; you know your duty far better than I do. Some of you are young—in the spring-time of manhood, with the flowers of hope all budding about you, and looking into the future with bright and glorious anticipations. It is a matter of importance to you that your lives be spent in a land where life and property are protected. Some of you are in middle age; upon your farms and in the midst of your substance and your families, and surrounded by all those sacred and tender interests suggested by wife, children, home, fireside. It is a matter of vast importance to you that law and order may prevail, and that robbery and murder come not to you or yours, when sleeping beneath your roof or traveling upon our public highways. One or two of you, I see, are growing old, and silver locks upon your temples, like whited plumes on the slow-moving hearse, remind you that your narrow home is not far away; yours is the solemn duty of handing down intact to your children and children's children, those laws and liberties intrusted to you by those who went before. All of you, as citizens, and now as public servants, are intensely interested in the peace and prosperity of a glorious state. The eyes of the world are upon you, and the sacred honor of Missouri is intrusted to your charge.

Col. Philips tells you that he "loves the state of Missouri; loves her institutions; loves her people; loves her honor." Had not one older than myself, with all propriety, used the word "love," I do not know that I would have arrogated to myself so much of patriotism as to employ so strong a term; but now that the example has been set, I trust that I, who have been reared from boyhood on Missouri soil, may follow along and say that I, too, love my grand and glorious state; love her forests and rolling prairies; love her hills and flowing streams; love her free air and black old soil, yielding quick to the touch of man in abundant grain, fruit or flower; and most of all do I love her hospitable, big-hearted people, in whose midst even prowling robbers, as in this case—unknown except to a few, as such, thank Heaven!—may find, if they choose, abundant food and shelter without a farthing's pay. What a magnificent state!—with her hundreds of thousands of happy, prosperous, intelligent, law-abiding inhabitants, and resources enough within her own boundaries, if tested, to supply their every want; with thousands of miles of railroads built largely with money received from the toil of her own sons, for the welcomed incoming and onward march of progress and civilization; with towering, cultured cities springing up on her borders, and fretted within with churches, colleges, and innumerable schoolhouses. While all this is true, I must also agree with Col. Philips that Missouri has been maligned, slandered, villified, as has no other state in the union. It is a proud fact that good laws are as firmly and impartially executed here as in any state in America, but common-candor forces the admission that while the bad stories heralded abroad have been exaggerated a thousand fold, they are not totally without foundation. A few desperate men have perpetrated on Missouri's soil as daring robbery and bloody murder as the world ever saw, and thus heaped odium on the people of the whole state. For you know by the evidence that the town of Winston in this state, was the scene of such a horror on July 15, 1881.

You now have it in your power, on overwhelming testimony, to proclaim to justice and the world our people's disapproba-

tion of this horrible crime. Alas! if with Frank James' guilt as clear as noonday, you should—from sympathy or prejudice—find as these gentlemen are beseeching you to find, what eternal stigma would you bring upon yourselves and your state. Gentlemen, hear me when I say it, let the court hear me, for after all that has been said, it is my duty to proclaim it in deliberate reply—and would that I had a voice so loud and shrill that it might resound in the remotest corners of your minds, and Heaven's most distant bounds might hear it—I say that a verdict of not guilty, on this overwhelming testimony, would bring greater shame upon the state than all the robberies, small and great, committed within her borders since 1866. It were far better for us, that this defendant had never given himself up to the officers, and had never been tried.

Col. Philips talked much about popular clamor, whose mighty storm he seemed so much to regret and fear, and he implored your bravery to stand against it. So, no matter who the defendant is, or was, or who his friends may be, we ask and implore you to stand bravely by your duty and your oaths given to your country and your God.

Gentlemen, my task is ended. May the "God who ruleth in the armies of Heaven, and doeth his pleasure amongst all the inhabitants of the earth;" "who holdeth the hearts of all men in his hands, and turneth them as the rivers of water are turned;" may the "God of the widow and the fatherless"—of McMillan's wife and child—come into your hearts, and guide you to a righteous verdict.

#### THE VERDICT.

At 12:30 p. m. the jury retired, and at 4 p. m. returned the following verdict:

"State of Missouri v. Frank James—murder: We, the jury in the above entitled cause, find the defendant *not guilty* as charged in the indictment.

"Wm. F. Richardson, Foreman."

A month after he surrendered to the Missouri authorities, Dick Liddil made a complete confession of his connection with the James Gang. It was sworn to on March 9, 1882, before Henry H. Craig, Police Commissioner of Kansas City, Mo., and was as follows:

#### DICK LIDDIL'S CONFESSION

My name is James Andrew Liddil. I was born on September 15, 1852, in Jackson County, Missouri. My father's name is James M. Liddil, and he lives in Vernon County, Missouri. I have known Jesse W. James since the year 1872 or 1873. I met him at Bob Hudspeth's, who lives about ten miles east of Independence, Missouri. I was working there at the time. Jesse came with Ben Morrow, whose father lives one and a half miles from Bob Hudspeth's. I think Ben Morrow was making his home at Bob Hudspeth's at this time. Within a few days after this I met Frank James, at Hudspeth's house. They were both outlaws at this time, and were on the "dodge," though they did not appear to be very apprehensive. I lived at Bob Hudspeth's for nine years, off and on, beginning in 1871 or 1872. During the first four or five years I saw Jesse and Frank James a great many times at Hudspeth's. He entertained them as friends, not through fear. During these four or five years I have seen them very often at Silas Hudspeth's, Bob's brother. He also entertained them as friends. They never told me, nor did I hear them tell any one, that they were train robbers up to this date. Both the Hudspeths knew all this time, as I did myself and people generally, that they were dodging the officers. I never knew them to stay longer than one or two nights during these years. Clell Miller, Cole and Jim Younger, Tom McDaniels, used to frequent some of the above named houses. They were dodging the officers, too, at this time. The first time I saw Jesse James was after the Northfield Bank robbery at Ben Morrow's, in Jackson County. I met Ben and he told me Jesse was to be at his house that evening, and had said he wanted to see me. About 2 o'clock I went to Ben's, and found Jesse in the yard getting some water out of a barrel. We had a little chat, and went out to where his horse was tied in the woods. He said he was broke, and wanted to make a raise, and wanted me to help him. I agreed. This was on Sunday. We separated then and went to meet at Ben Morrow's, next Wednesday evening. We met, according to appointment, and he told me he wanted to rob the C. & A. or Missouri Pacific train. He said that he had two other men besides himself. He said that he had come up from Gen. Joe Shelby's, in Lafayette County, where he had been since seeing me on the preceding Sunday. We then went up to Jim Hulse's, getting there about 1 o'clock at night. We found Ed Miller there. Hulse entertained us as friends. We all three left the next night. I had no arms at that time. Jesse had a pair of Colt's .45 caliber, and Ed Miller had a breech-loading shotgun, a pair of Smith & Wesson's .44 caliber and an old-fash-

ioned navy pistol. We then went from there to old Thomas Eddington's, not to the house, but hitched our horses out in the woods. Next morning I went up to get some food for us. I told them for whom I wanted it. After eating breakfast, Ed Miller started over to Clay County for "Father Grimes" (Wood Hite) and a man by the name of Smith, who lives about five or six miles from Kearney and about three or four miles from Mrs. Samuels. He was a single man, I learned. Ed Miller was gone two days, and returned with Grimes and Smith. The former he got at Mrs. Samuels, his aunt's. During this time Jesse was hiding at Ben Morrow's, and I was at old man Eddington's. Upon Miller's return I told him to hide out in the brush and I would go after Jesse, which I did. When Jesse and I returned, Smith had run off and left. He was afraid he would be killed. He thought Jesse was going to do it. After he left, we disbanded—Grimes and Jesse going over to Mr. Ford's, near Richmond, Ray County, and Miller to see what had become of Smith. I stayed at Lamartine Hudspeth's.

About three days after this, Jesse and Grimes came back, and we three went back to Jim Hulse's. A little after this Ed Miller came up there also. He said Smith had gone home and was playing off crazy, and had lost his pistol, hat, etc. The next morning I came up to Independence, took the train for Kansas City, and bought me a pair of Smith & Wesson pistols, .44 caliber, from Blitz the pawnbroker, in the Times Building. I went back to the train, mounted my horse and rode to Independence, rode down towards Dick Tolley's, and met Jesse and Ed Miller on the road. We went off by the creek in the woods, where we found Grimes and Bill Ryan. We talked the matter over and determined to rob the C. & A. train at Glendale. We then broke up that night. Miller and I went to Tucker Basham's house—I don't know where the others went—but we were all to meet at the schoolhouse, several miles from Glendale. I did not know at that time who Basham was, and we did not know his real name until after he was arrested. They called him "Arkansaw." The next evening, about sundown, Miller and I started for the schoolhouse, and "Arkansaw" was to follow. The schoolhouse is about one mile from Basham's house. We met at the schoolhouse and all went to Glendale together. We arrived there between 6 and 7 o'clock on October 8, 1879, and hitched our horses about 30 yards due south of the station. Basham, Ryan and myself captured Joe Molt's store, and about fifteen or twenty men who were in it; and Jesse James, Ed Miller and Wood Hite captured the depot. Jesse, who was the leader, then sent word to us to bring our prisoners over to the depot, which was done—and we put them all in the depot and guarded them. I think Jesse tore the telegraph apparatus to pieces. Basham thought it was a sewing machine, and wanted him to stop, as destroying it would do no good. A little east of the depot, obstructions were placed upon the track to stop the train in case flagging failed. When the eastern-bound train came in sight we made the operator signal the train to stop it. The train stopped. Our plan was this: I was to



capture the engineer and fireman, Bill Ryan was to uncouple the express car from the train, so that we could, after backing the train, run the engine forward again and leave the passenger coaches all to themselves. Basham and Hite were to keep the passengers on the train, while Jesse and Ed Miller robbed the express car. The cars had a patent coupling, so that Ryan could not unfasten them; so he helped Basham and Hite keep the passengers in. We carried our respective parts with the above exception. Fifteen or twenty shots were fired in all—most of them in the air, and a few of them at a man with a lantern at the rear part of the train. Jesse said he fired three times at this man. Ed Miller got a sledge hammer out of the engine and struck the door of the express car several times before the express messenger would open it. They went in, and I think the messenger tried to get out and James struck him with his pistol. After the car was robbed, we were all standing on the depot platform together, when some one fired a shot from the train which went through the drawers and pants of Wood Hite, on the outside, between the ankle and knee of the right leg. Jesse remarked, "They are firing on us and we had better leave." We then went to our horses, carrying our plunder in a common meal sack. We mounted and rode about six or seven miles south, to a little old log cabin, uninhabited, where we dismounted. Ed Miller carried the plunder. Here we divided the plunder equally, each getting about \$1,025. There were a great many bonds, etc., and these were all destroyed. We left there all together and retraced our steps several miles. When we began to break up, Ryan and Basham going home, we took Hite into the Kansas City road, about half way between Independence and the bridge over the Big Blue, and left him. He went to Kansas City, I think, to Charlie McBride's. I did not know what Grimes' right name was until the next spring, when I learned it was Robert Woodson Hite, and that he lived near Adairsville, in Logan County, Kentucky. Jesse, Ed and myself rode down into the "Six-Mile" country, after the robbery, and I left them in a thick woods, about three-fourths of a mile from Bob Hudspeth's, and went on to Lamartine Hudspeth's. Lamartine lives about two miles from Bob's. From Thursday to Saturday I carried them food.

Saturday night, the time the big raid was made, Jesse and Ed Miller left about 10 o'clock in the direction of Kansas City; and Jesse afterward said that some time during the next day (Sunday) they saw members of the raiding party returning to Kansas City. For two or three weeks after this I continued to stay in "Six-Mile," and then left for Ft. Scott, where I hauled coal for about four months. A few days after going toward Kansas City, Ed went to George B. Hite's, near Adairville, Kentucky, and Jesse went to Nashville, Tennessee, where his wife was then living. Frank James and his wife were also living here at this time. After leaving Ft. Scott, I went to Carthage, Missouri, where I teamed it for about two months—having two teams. Sam Strickland, colored, was

with me nearly all of this time. From there I came to Jackson county, and stopped at McCraw's, where I learned that officers had been looking for me ever since I left Jackson county. I sent McCraw down to Carthage after Mattie Collins, Strickland and my teams, and they drove them up. I dodged around from one place to another, staying at Lamartine Hudspeth's, principally. The same day that they returned from Carthage with the teams, Ed Lee, now deputy marshal under Murphy, and then constable of Osage township, got after me at Lake City, and we had a run of about two and a half miles. I was riding a horse of Bob Hudspeth's, which I had down to Lake City for the purpose of running a race. I had ridden him two heats, before the chase began. I was unarmed at the time. Lee fired two shots at me; but I rode hard straight to Hudspeth's, put the horse in the stable, struck out on foot, and next day went to Ben Morrow's, who knew I was dodging the officers, and bought a horse from him in a trade. I gave him for it one of my wagon horses and a set of harness, all valued at \$125. I then rode to Jasper county, Missouri, where I stopped at the house of a man named Johnnie Lohr, a German, for whom I worked by the month. I stayed there about a month. While at Ft. Scott and Carthage I went by my right name, but at Lohr's I went by the name of James Anderson. I came back on horseback to Jackson county, and went to the widow Broughton's, who lives near the Hudspeths. I stayed there about one day, and went from there to Mrs. Samuels, near Kearney in Clay county, Missouri. I went to see Ed Miller, as Johnnie Samuels had come over and told me he was there. I crossed the river at Blue Mills. Upon arriving, I made myself known to Mrs. Samuels. I had been there but a few minutes when Jesse James came in. He had been there several days. While I was there, I sold him one of my horses, a set of harness and a wagon for \$125. He never paid me, however, until he robbed the paymaster at Mussel Shoals, Alabama. We stayed about two days at Mrs. Samuels, and then he and I went over to Mrs. Bolton's, about one and one half miles east of Richmond. This is the same place where Sheriff Timberlake and Commissioner Craig made the raid, in the early part of January, 1882. We found there Charlie Ford, "Cap" Ford, Mrs. Bolton and the children. They knew Jesse, but did not know me. We stayed there a day and night, and left for Bill Ryan's, in Jackson county, crossing at Blue Mills. We found Bill Ryan at home, and left next night, taking him with us. We crossed through the state to Cape Girardeau, where we crossed the Missouri river and went directly to young George Hite's, in Logan county, Kentucky. He was living at the house of his father, George B. Hite, where Jeff Hite was afterward arrested.

We were on the road about three weeks, and I did not see any friends en route. We found Grimes there, and learned for the first time his real name—Robert Woodson Hite. Jeff (Clarence) Hite was there also. We stayed there a couple of days, and leaving

Bill Ryan there Jesse and I went to Nashville, Tennessee. From there we went to Jesse's house, which was about three miles from Nashville, on the Hyatt Ferry Pike, and a quarter of a mile from the Cumberland river. Jesse was going under the name of J. D. Howard, and he pretended to be a sporting man. His wife, son and daughter were living there as was Frank James, his wife and their little son. Frank was going by the name of B. J. Woodson. His little son, who was then about three years old, was named Robert. Jesse's son was seven years old, and named Tim; and his daughter was three years old and named Mary. Frank's wife was named Fannie, and Jesse's wife was called Josie. Frank was engaged at the time in hauling saw-logs. We all went up to Nashville very frequently, and made no attempt at concealment, apprehending no special danger. After remaining there about two weeks Jesse and myself went back to Hite's, where we had left Bill Ryan. Young Joe Hite knew we were dodging the officers; but he entertained us as friends, and not because he was intimidated. During the day we kept hid in the woods, and at night we slept in the house. Old man, George B. Hite, brought food to us in the woods oftener than anybody else. Clarence and Wood Hite brought it when their father did not. Bill Ryan was going under the name of Thomas Hill. The last time we arrived in the night and left the same night, taking Bill Ryan with us. We started to rob the Mammoth Cave stage. It rained so hard, however, that we gave up the idea after getting within one mile and a half of the place, and we came back to Hite's again. We stayed in the woods that night, and next morning I left for Jesse's place, near Nashville, leaving Bill Ryan and Jesse, who said they would knock around the country and see what they could rob. In about ten days Jesse came home and told me that he and Bill Ryan had robbed the Mammoth Cave stages. This was, I think, in the latter part of August, 1880, or September 7. The stages were robbed within an hour of each other. A lawyer by the name of R. H. Roundtree, of Lebanon, Kentucky, lost a handsome gold watch. Jesse got the watch and the key to it. On the key was inscribed the name of "J. Proctor Knott and Mr. Roundtree." Jesse has the watch yet. Miss Lizzie Roundtree lost a fine diamond ring, which Jesse James' wife has had made smaller for her finger, and she wears it now.

Jesse also got from her another plain gold ring which he gave to Nellie Hite, sister of Clarence Hite. Bill Ryan got one silver watch and a small gold chain. Jesse got another silver watch which he gave me. This watch I traded to Frank James for a gold watch and chain, I giving a good horse to boot. This gold watch and chain I gave to Mattie. They got about \$30 in cash which was divided equally between Ryan and Jesse. Bill Ryan afterward pawned the silver watch he got in this robbery to Dick Talley for a saddle. These silver watches, I learn from book accounts, belonged, one to W. G. Welsh, Pittsburg, and the other don't know to whom. When Jesse James come home after this robbery, he left Bill Ryan up at

Hite's again. After remaining about a week Jesse and Frank left for Hites in order to get Bill Ryan; and all three to go up into Kentucky to rob a store about sixty miles from Adairsville. Jesse rode horseback and I went on the train to Springfield and walked out to Hites. The following night, Clarence (Jeff) Hite and I went up to Adairsville for the purpose of borrowing somebody's horse for an indefinite length of time. We found it hitched to Dr. Hendrick's hitching post in front of his office. I held Clarence's horse while he got down and unhitched the animal. It belonged to young Simmons, whom I afterward learned was visiting the Doctor's daughter. This mare was a jet-black one, with four white feet—was a fine one. We went back to Hite's, and same night, Ryan, Jesse and I started for the store—were two days getting there. Tuesday morning, the fifteenth day of September, 1880, I left Jesse and Ryan in the woods, and went to John Davey's store, can't recall the name of the town. It was some railroad station where they were mining coal, to reconnoiter. Came back in a short time and reported, and then went down town together. I was to guard the door and not let any one out, and Ryan and Jesse were to rob the safe. We carried out the programme, but only got \$4.23, and a gold watch and chain from Davey. The watch I pawned with a friend in Jackson county, Missouri, and can get it any time. Ryan got the chain; don't know what he did with it. This took place between 9 and 10 o'clock a. m. We left and went across the county on a bee line for Hite's. Got there the following night. We told old man George B. Hite, Clarence Hite and Wood Hite where we had been and what we had done. None of them made any objections to our staying around them. The horse that we got in Adairsville was put in a stall at a camp meeting ground close to Adairsville for the purpose of letting the owner find her—which was done. In a day or two Clarence Hite took Bill Ryan to Nashville in a buggy and left on a train for Jackson county, Missouri; we intending to follow soon. Jesse and I stayed at Hite's for a few days and rode down to his (Jesse's) house near Nashville—remaining there about two weeks attending the races at Nashville and then went to Atlanta, Georgia, to attend the races. When they were over, came back to Nashville, stayed three or four days, and then Jesse and I took the train for St. Louis; from there to Richmond, Ray county. Before leaving, Jesse took his family to Nashville where they stopped at a boarding house. Just after Ryan had left for Kentucky, and while Jesse and I were still at Hite's, we concluded to go down and rob the Gallatin stage. On the way down overtook two young men and attempted to rob them and had a shooting scrape. One man saw me drawing my pistol, when he drew his first and shot at Jesse, who was a little ahead of him. The other man started to draw his when I shot him through the right leg. He then turned and galloped off. The other one and Jesse exchanged a few shots, when Jesse took to the woods. My horse had run about fifty yards when I turned and the young man and I were closing in, he fired his last shot and turned and galloped off.

Jesse fired two shots at him from the woods, and four shots before running to the woods. I shot three times. We didn't get any money this time. We went back to Hite's and from there to Nashville as I have before stated. After Jesse and I had reached Richmond, we went out to Mrs. Bolton's. Met Jim Cummings there; remained a day and night, and went up in Clay county, to Mrs. Samuels'. We were preparing for another strike. Put up at the house and locked our horses in the stable; stayed there two days and nights, when I left and rode to Bob Hedspeiths crossing at Missouri City; stayed all night and went from there to Bill Ryan's. Went to tell Bill not to go away, as Jesse and Cummings would be over in a few days. Found him at home. Stayed until Jesse and Cummings came over—they rode over and crossed the river at Leavenworth (bridge). We then all started back to Nashville on horse back, having given up the idea to make a raid. Down on Iron Mountain road I took the train and the other boys led my horse. Got to Nashville about December 1, 1880.

Before starting back to Tennessee this time Jim Cummings and I took a horse a piece from a man by the name of Duvall who lives five or six miles from Richmond, Missouri. Charlie Ford told us where they were. These were the horses Jesse and Jim Cummings rode over to Bill Ryan's. Jesse and Bill Ryan took horses from men near Independence. After getting to Nashville I traded my horse to Frank James for the watch, as I have stated. Jim Cummings sold his through a man who stays at H. H. H. Hammer & Co. livery stable. Bill Ryan sold his at same place and Jesse sold his at Maysville, Kentucky, to some one. Cummings went by the name of Wilson. Just after getting back Jesse rented a house over in east Nashville (Edgefield) and took his family and Ryan and Cummings to live with him. I stayed out at Frank's until just before the Mussel Shoals robbery. Frank moved to Edgefield, near to where Jesse was living, and I went with him. During this time—about three months—Jesse, Cummings and Ryan made frequent trips about the county—up to Donny Pence's and other places. While living at Edgefield Jesse tried to get us to agree to have Cummings killed. I would not agree to this and Cummings left and we, fearing that he would inform on us, scattered. I went to Hite's. Jesse's family moved over to Frank's house and Frank, Jesse and Bill Ryan left for Alabama, where they robbed the United States paymaster, Smith, at Mussel Shoals. They got \$5,200, about, and a pistol. This robbery took place about ten days after we left Edgefield. I did not know anything about it until after Bill Ryan's capture. After the robbery the three came straight back to Nashville and Jesse came on up to Hite's after me and then rode back to Nashville. Clarence drove me to Springfield and went down to Nashville on train with me.

Jesse and I stayed in Nelson county about a week longer and then rode to Louisville, Jesse riding a sorrel horse he had stolen from a man in Nashville and had left with Donny Pence. This

horse was stolen before Ryan's capture a little while and I rode the one I had gotten from near Adairsville. This was a brown. We left these horses at a livery stable near the center of the city, fronting east, I think, and told the proprietor to keep them until we called. Have never called yet.

When I arrived next morning at Mrs. Samuels' Jesse was absent. Frank and Wood were there and Clarence did not arrive until late in the evening. The first thing Frank wanted was for me to go with him up in Platte county and get horses for him and Wood. We went and were gone four or five days but did not find any good horses and did not get any. When we got back Jesse had arrived. We all stayed in the house. Our horses—that is Jesse's and mine, were kept in the stable. In three or four days Wood and I took the evening train at Kearney; went to Liberty and got two horses saddled and hitched to a rack near the Athens House; rode them back to Mrs. Samuels'. She knew we were going to Liberty after the horses. The horses that we got in Liberty were turned loose near Richmond, Missouri, by Frank and Wood, Frank keeping one of the saddles, and the other, not being much account, was thrown away. He and Wood stole two other horses near that point and rode them up to the old lady's. Frank still was not satisfied with his mount so he and Wood took another tour way up in Platte county but did not get a horse. When they got back Frank and I started out after a couple of horses. We went down to Mrs. Bolton's and next night stayed on Elk Horn, between Kearney and Richmond; got a dark bay horse from a man by name of Frazier, and a mare from a man who lives about a mile further toward Richmond and about ten miles from that place; turned the other two horses loose and rode the new ones back to Mrs. Samuels'. All five of us were then there. About the next night Jesse, Clarence and I went over to a man's by the name of Mathews who lives about one mile from Kearney and got his sorrel horse with bald face and white legs. That night we all stayed out in the woods near the old lady's with our horses and the following night we all started out in the direction of Winston for the purpose of robbing a train.

We dismounted at the public spring at Independence and sent back the horses by the boy named Andy (Andy Ryan). All came according to agreement to meet the other boys at the wagon bridge south of Independence, about one and one-fourth miles down the Chicago & Alton Railroad. When we reached it we found Jesse, Frank, Charlie and Wood. Our object in meeting was to perfect arrangements for robbing another train. We went up and examined the Missouri Pacific Railroad that night and stayed in the woods about one mile from Blue Tank. We prowled around here for several days and finally concluded to rob the Missouri Pacific railway train eastern-bound. This was Friday night. Frank and Jesse, about sundown, unknown to us, went out, ostensibly for the purpose of hunting railway ties with which to obstruct the track, and while absent fastened a piece of iron on a rail for the purpose of

ditching the train. This plan did not suit the balance of us, but, as the train was almost due, not much was said. The train came along and ran right over the iron and passed along safely. The next night we went to take the Chicago & Alton about three miles west of Glendale, but we were very tired and gave up this idea. The train came along and it was guarded by men whom all plainly saw standing on the platform. We then came up near Independence and disbanded. Wood and I went to Mrs. Bolton's, crossing in a skiff near Lexington; the other four came back to Kansas City. We stayed down there about two weeks or more, when Jesse sent us word by Charlie Ford to meet him right away at same place as our first meeting near Independence. Charlie had been going backward and forward between Richmond and Kansas City.

Charlie went back on train and Wood and I went to appointed place, crossing at Napoleon after being at the rendezvous.

While staying at Mrs. Bolton's during this time, Charlie Ford and I robbed the stage that runs between Excelsior Springs and Vibbard. There was in it a merchant from Vibbard named Gant and the driver. Charlie made them stand and I made them deliver. We got about \$13 from the merchant and about \$17 from the driver. Charlie had on a mask, but I had none. This took place between sundown and dark. We went back to Mrs. Bolton's from there. About a week after this, Charlie and Bob Ford, Wood Hite and myself robbed the stage going from the Short Line depot and Lexington. It was down in Ray County, Missouri. All were masked. It occurred about dark. A mover first came along and found us hid and wanted to know what it meant; we explained the situation to him by capturing him and taking \$20 of his hard earnings. In about five minutes the stage came along. There were eight passengers, I think, in it, two of them women. Bob and Wood made them stand and Charlie and I robbed them. We made the men get out. Did not molest the women. We got about \$200 in money, "one gold watch and chain," "one nickel-plated watch and gold chain," "one silver watch, no chain," and one pocket knife. Wood Hite got one of the watches (the silver) which he afterward sold to me, and I gave it to Bob Ford and he has it yet. Bob got the nickel-plated watch and chain. Wood afterward won or bought it from him and he gave it to "Cap," who has it now. The gold watch and chain fell to my lot. I gave it to Ida Bolton. She has it yet. Hite got the knife and lost it. We went back to Mrs. Bolton's after the robbery. Found Charlie Ford and afterward Frank came and we went down to within about one mile of old man Ralston's, where we met Jesse and Clarence.

We then went down to Chicago & Alton road about half a mile south of Doc Reed's. Stayed there all night and next day. The following night we went up to within two or three hundred yards of old man Ralston's, where we met Frank, who had left us for the purpose of getting provisions. He had a basketful; suppose he got it at his father-in-law, Ralston. We went from there the

same night to about three miles of Glendale. Laid in the brush all next day. I went down to the section-house and got some bread and raw meat. That night we robbed the Chicago & Alton western-bound train. It was the night of Wednesday, the 7th of September, 1881. This was called the Blue Cut Robbery. Our program was this: Wood and Charlie Ford were to stop the train by swinging a red light; this was an ordinary lantern with a red piece of flannel tied around it. We had piled rocks upon the track so as to obstruct it. After the train had stopped, Charlie and Wood were to capture the engineer and fireman and then rob the express car. Jesse and Clarence were on one side of the track upon the bank and Frank and myself were on the other side. Besides our pistols, I had a breech-loading shotgun and Frank had a Winchester rifle, Jesse had a breech-loading shotgun, and Clarence had a Winchester rifle. The train came along in due time and was stopped by the lantern and the fireman and engineer captured. The fireman was made to take his sledge-hammer and attempt to beat down the door to the express car. After several blows the messenger opened it. Wood and Charlie went in and robbed the safe. Charlie struck the messenger several times with his pistol and made him open the safe. Very little was found in the safe and Jesse suggested robbing the passengers. Charlie and Wood commenced at front of the train, Wood carrying the bag and Charlie making the passengers disgorge. Clarence stood at door on platform. Jesse and I at one time were on the rear car. This was after the passengers had been robbed. Frank got on one of the forward coaches. Just after the train stopped, some one started down the track with a lantern. We fired a number of shots after him, but when told he was going to flag the freight train, we stopped shooting. There was no one participating in this robbery except we six. There was no one in sight when we stopped the train besides ourselves. Before the train started again we all had started toward Independence. About half a mile or more, we stopped in a woods and divided the booty. This consisted of a breastpin and set of earrings; five watches, two with and three without chains, I think; two rings, one a plain gold ring and one with a set in it, and some money. Everything in the jewelry line was put up and sold to the highest bidder, except these two rings; Jesse kept one of these and I kept the other. The prices bid were turned into the common fund as so much cash and then this fund was divided equally between the six. All got about \$160 apiece—as near as I can now remember. Jesse got one of the watches, a nickel-plated watch. Wood Hite got a gold watch belonging to the messenger. Charlie Ford got two—a gold and a silver one. Don't know what disposition he made of them. Clarence got a silver one. Jesse said he threw his ring away, and I gave mine to Mrs. Bolton. After the division Wood and I started to Blue Mills Ferry with the intention of going to Mrs. Bolton's, and the other four started to Kansas City. Wood and I came near running into some officers at Blue Mills Ferry, but we dodged out into the woods. There we sepa-



rated; Wood went down to cross the river near Sibley and went to Mrs. Bolton's, and I went down to Ben Morrow's. Got there in the morning after staying out in the brush near by till night.

I told him about the robbery, told him I was in it. I also told him that Frank, Jesse, Wood Hite and Clarence, and a man by the name of Johnson from Texas was in it. I did not wish to tell on Charlie Ford, is the reason I gave him this alias. Took breakfast with Morrow, and stayed around, then hid in the woods and stable two days and two nights. Morrow knew where I was all the time and furnished me food—all that I got. He brought me a couple of bottles of whisky, also. When I left he told me where I could get a skiff to cross the river. I did not go there, however, but went to Sibley and crossed over in a skiff that I cut loose from the bank and used. After crossing I went to Mrs. Bolton's. After being there a couple of weeks Charlie Ford brought us word from Jesse that he wanted us to go to Kentucky and rob the Louisville & Nashville road. Wood and I then took the train at Richmond and sent word to Jesse we would meet him at old man Hites' near Adairsville, Kentucky. We arrived at Mr. Hites' and, after being there about four days, Wood and I had a shooting scrape, and I took the train and came back to Mrs. Bolton's, Ray County, Missouri. Had been back only two or three nights when Clarence, Frank and Charlie Ford came in. They stayed a day and night and started for Kentucky, wanting me to go with them. I declined to do so. Remained there two or three weeks, and then Bob Ford and I crossed over at Missouri City into Jackson County. We went to McGraw's and stayed about a week. He was out with a threshing machine while I was there. Did not see him but once while there. We then went to Mrs. Bolton's, crossing below Sibley in a skiff. Arrived there Saturday night, December 3, 1881. Next morning I came down to breakfast, and Wood Hite, who had come from Kentucky three or four days before, was there, and Bob Ford came down a few minutes afterward. When he first came in he spoke to me, and I told him I did not want him to speak to me, as he had accused me of stealing \$100 at the divide in the Blue Cut robbery. Told him he lied; said he could prove it by Mrs. Bolton, and I wanted him to prove it. He then denied ever saying anything of the kind. I told him he did, and we both commenced drawing our pistols. We fired about the same time. He shot me through the right leg between the knee and hip, and I shot him through the right arm. He fired four times at me and I five times at him, and then snapped another barrel at him. I drew my other pistol when he commenced falling. Bob Ford fired one shot at him. Did not know this until afterward when he exhibited the empty chamber. The wound that killed Hite was through the head. It struck him about two inches above the right eye and came out in front and a little above the left ear. Bob claimed that his shot was the fatal one. Hite lived fifteen or twenty minutes, but did not speak. We carried him upstairs, and that night of December 4th "Cap" and Bob dug a grave in the woods

about a half mile from the house and buried him. My leg was too sore to help. Did not use a coffin. I never had any physician dress my wound or give it any attention until after I surrendered. On the night of Thursday, the 29th of December, Jesse and Charlie Ford came down to Mrs. Bolton's, where I had been since being wounded, and tried to get me to go with them. They claimed to have come from Nebraska. I declined to go. I mistrusted Jesse wanted to kill me and so left. This was on Saturday night, December 31, 1881. Jesse and Charlie left the next night for the old lady's, I was told. This was the last time I ever saw him, and I never have seen Charlie Ford since. After the raid on Mrs. Bolton's house early in January, 1882, I concluded to surrender. Negotiations to that effect were made, and on the night of January 24, 1882, by directions of Governor Thos. T. Crittenden I surrendered to James R. Timberlake, sheriff of Clay County, Missouri. Dick Liddil is a nickname for me.

#### CLARENCE HITE'S CONFESSION

Before Liddil's surrender, Clarence Hite, one of the "gang," was arrested, pleaded guilty, and was sentenced to imprisonment for twenty-five years.

A short time before his death, in the Warden's office of the State Penitentiary at Jefferson City, Mo., in the presence of Governor T. T. Crittenden, H. H. Craig and Sheriff Timberlake, he made a full confession as follows:

I met Jesse and Frank James about ten years ago, just after the war. They came to our house and staid two or three months. My first act of lawlessness was at Winston, Missouri. I came to Missouri with Jesse's wife. We came from Nelson County, Kentucky. She was staying at Donny Pence's. He was Sheriff of the county. She had been staying there about one month. Jesse and Frank were in Nelson County at the time. Frank was at Aleck Sears', and Jesse and Dick Liddil were at Bob Hall's. Jesse stayed at Pence's several nights while I was there. Before I got there (Donny Pence's) they stayed at Dock Hoskin's. The latter lived about twelve miles from Pence's. Hall lived about one and a half miles from Pence's. Myself, Jesse's wife and her two children came on to Kansas City. We left Pence's the last of April (1881). Put up at the Pacific House, Louisville. She was registered as Mrs. Jackson, or Wilson, and two children, Bowling Green, Kentucky. I registered as C. Browler, Bowling Green, Kentucky. When we reached Kansas City we stopped at Charlie McBride's, on Seventeenth street, between Oak and McGee. Got there Saturday night. Monday I went over to Mrs. Samuels' and she came over to see Jesse's wife. I stayed over there about one week, when Jesse and Liddil came. They stayed there off and on till the last of July, 1881. The Winston robbery was on July 15, 1881. Frank arrived at Mrs. Samuels' one week after Jesse and

Dick Liddil did. No one came with Frank. He remained there until the robbery.

When the robbery was planned at Mrs. Samuels', there were present Jesse James, Frank James, Dick Liddil, my brother, Robert Woodson Hite, and myself. We five were the only ones engaged in the robbery. I do not know where my brother is now. I last saw him in last November, at home. His name is Robert Woodson Hite. He left home without saying where he was going.

We robbed the train about one month after the robbery was planned. We went there once before to do it, but all got wringing wet, and Jesse caught the toothache out in the woods, and his face swelled up so he could hardly see, and we gave it up for the time being, and he (Jesse) got a man who lived one-half mile from the Hannibal & St. Joseph railroad to take him to Hamilton in a buggy. He had a large flock of sheep, and his house was a long way from the fence. Jesse took the train at Hamilton and came on to Kansas City. Frank helped him in the buggy. To Hamilton was about three miles. As you go east, the man lived on the right-hand side. Jesse told me he paid the man \$1.50 to haul him to town. When the party first left Mrs. Samuels', Jesse, Frank, Dick Liddil and my brother rode down to Ray County to Mrs. Bolton's, and I came on to Kansas City to get some newspapers and cartridges. I got them and went down to Ray County to Mrs. Bolton's. I got there one night and left there next morning for Richmond, Missouri, and then left for Plattsburg, Missouri. Frank, Jesse, Dick and my brother went on horseback to Gallatin. I went to Plattsburg to get a bill changed. I then took the Rock Island train for Gallatin. We all then went out in the woods and had a talk. They got on their horses and rode to Kidder and I got on the train and went there. I went on the train because I had no horse. When the party was at Mrs. Bolton's, her three children and Charles Ford, Capt. Ford, Robert Ford, and another Ford, a great big fellow, were there. Neither the Ford boys nor Dr. Samuels or his wife or their son knew what was brewing when the party was at Gallatin; they stayed out in the woods. After Jesse was put on the cars I rode his horse and Frank and Dick led my brother's. We went down near Mirable, and went from thence to Mrs. Samuels', and Dick and Frank went from there to Mrs. Bolton's. My brother got on the train and went to Mrs. Samuels'.

A week or so afterward Jesse wrote to John Samuels to bring his horse over to Kansas City. He (Samuels) did so the following Sunday. He received the letter the preceding Saturday. Jesse and his wife were keeping house in Kansas City. I went over to Kansas City on the Fourth of July, 1881 (on Monday after Samuels took the horse over). Jesse rode over to Mrs. Samuels on the night of July 4th, and John Samuels and myself came back that night. Jesse said he crossed on the ferryboat at Kansas City. He said he came by some newspaper office and read the Garfield bul-

letins. He said he gave —— a watch. A few days after Jesse arrived at Mrs. Samuels', Frank and Dick came up from Ray County. They got there Wednesday night. We all remained there about one week. Frank and Dick went back to Mrs. Bolton's before going to Winston.

The gang came back again to Mrs. Samuels' before going to Winston. It is about thirty-five or forty miles from Mrs. Samuels' to Winston. When we started to Winston we left on the Sunday night before the robbery, about 8 o'clock. We went above Plattsburg, about six miles, the first night. A few miles from Mrs. Samuels' we met a man riding a whitish horse, whom Jesse said he knew, named Pence.

We arrived at the point above Plattsburg at daylight. We laid down in the woods and went to sleep. We slept till about sunrise. We then crossed the Rock Island road and went close to a little town, and Dick and myself went in and bought some candy and stuff. Dick had a shoe put on his horse. This was on Monday morning. The rest went on outside of town and stopped. We went through the edge of Cameron, and Frank, my brother and myself went up to an oatfield, pulled down some shocks and laid down, while Jesse and Dick went into town and bought some sausage, etc., and looked at the Rock Island train. We three slept until daylight. Jesse and Dick came and waked us up about 11 o'clock, and they went past us down into the woods.

We then went on close to Cameron and stayed in the woods till late in the evening and then went on up to Winston. Frank and myself went on through to Winston, and the rest came on afterward. We all went down in some woods below Winston, and that night (Tuesday) Frank and myself went back to Winston and got something to eat. We went back then to where the rest were and slept till morning. Frank and myself then went above Winston, about five miles northeast, and had our horses shod. We all then went up near Cameron, intending to rob the train there, but there were too many people got on, and we went back in the woods and slept all night (13th). Got up before sunrise (14th). We went to Gallatin. That night we intended to rob the train at Gallatin, but we hitched our horses too far away, and the train passed. Friday morning we got up about 9 o'clock. Frank and myself went together; Jesse and my brother went together, and Dick by himself. We went to Winston. Thursday night we stayed about one and one-half miles from Gallatin. We got to Winston about sundown. Went into town after hitching our horses three-quarters of a mile out in the woods east of Winston. Horses were hitched on the south side of the road. The horse I was riding, Jesse and Dick got from some one near Kearney. They stole it on Sunday night. Jesse was riding a bay horse belonging to John Samuels. Frank was riding a little bay mare belonging to a man in Ray County. Dick Liddil was riding a chestnut sorrel horse that he bought of Lamartine Hudepeth and sold back again. My brother

was riding a bay horse about 9 years old that Frank and Dick got near Vibbard, in Ray County.

We were at Winston when the train came along. Jesse was our captain. Our relations were as follows: Frank James, Jesse James and my brother got on the smoking-car, and Dick and myself got on the front platform of the express car. The understanding was that Dick and myself, as soon as Jesse or Frank should pull the bell-rope, were to climb over the coal and pull down on the engineer and fireman and make them obey orders. As soon as they rang the bell, which was before we reached the bridge, we climbed over the coal and made them stop the train. The understanding was that we were to stop the train anyway before reaching the bridge. Jesse, Frank and Wood were to go in and rob the car. At the first stoppage Frank ran around to the side, seized the baggageman by the leg and pulled him out of the car. They then commenced firing into the car and the expressman opened the door. They went in and robbed the car. All this took about half an hour. We got \$126 and some cents apiece. Jesse said the conductor started to draw his pistol and he (Jesse) told him if he drew it he would kill him. He did not desist, and was shot. Jesse did not know the conductor. There is no truth in the story that Jesse killed him because he supposed he (the conductor) had carried Pinkerton's detectives out to his mother's (Mrs. Samuels') house. The stonemason was shot accidentally.

We were about a quarter of a mile from the horses after robbing the train. We then went to our horses. I cut mine loose, leaving a part of the hitch-strap. We went across the Hannibal & St. Joseph road between Kidder and Hamilton, beyond Mirable, to Crooked River. Rode all night. Stopped in a little woods after pulling down a fence and going through a field. I went to sleep; so did Frank. This was about daylight. We stayed about an hour, then went across fields till we reached Crooked River (Saturday). Jesse and Frank said they knew the country. We went down the river five or six miles and stopped on a bluff; Dick and I bought some bread of a woman. This was about 10 or 11 o'clock. Saturday morning, the 16th, about half an hour before sunset, Jesse, Frank and myself went west in the direction of Lawson. Met a man named Skidmore in the road, and, going on, took supper at a woman's house. We went then to Lawson. Just before reaching there we met several men in the road; said "Good evening" to each other. Went through Lawson to about three miles of Mrs. Samuels'; laid down and slept till morning. Next morning went to within three or four hundred yards above the house. Stayed there about a week. While there Will Nicholson and Mrs. Samuels furnished us supplies. We would go near the house and Johnny Samuels would bring us food when near their respective houses. Mrs. Samuels came out one night with Nicholson. We divided the plunder the next Monday after the robbery in the little woods I have spoken of. We discussed whether we would rob the passengers,

and decided not to. Jesse said he was sorry he had killed the conductor, but when he learned that he had brought the train to Mrs. Samuels (the time the explosion occurred which shattered Mrs. Samuels' arm), he said he was glad of it. We got the papers regularly. Nicholson and John Samuels brought them to us. After breaking camp, we went to Mrs. Bolton's in Ray County.

Wood and Dick did not go to Mrs. Samuels'. They went direct from Mrs. Bolton's to Crooked River. We stayed at Mrs. Bolton's about three days, and all five of us went back then to Mrs. Samuels'. We stopped in the woods north of the house about three hundred yards. Nicholson and young Samuels still brought us food. Dr. and Mrs. Samuels came out to see us. When at Mrs. Bolton's we stayed in the house in daytime and in the woods at night. (This is a custom.) One night, at Bolton's, Dick stayed at the house, got scared at some people riding over the bridge and ran out of the house, leaving his clothes and pistols. When we left Mrs. Samuels' we bought a wagon of her for \$25 and a set of gear from Nicholson for \$18, and drove Dick's horse and that of Chas. Ford. He (Chas. Ford) had come up from Ray County.

We then separated and Charlie went to McGraw's and got his horse and he, Dick and Wood went over to Mrs. Bolton's. Jesse and myself went to Kansas City, and Frank went to Ralston's. I stayed at Jesse's house two weeks. He stayed there all the time. He walked out at night and I would go down town at night. Jesse's house was east of the Fair Grounds. It was a white one-story house. Don't know the street. It was some "avenue." Think it was about the middle of the block. It was in the edge of town. One house was about 30 feet from it. He was going by the name of J. T. Jackson. In about two weeks after I got there he moved to a house near the Woodland schoolhouse. This was on the north side of the street. He went by the same name there. The night before we moved to the second house Frank came to the first house. A grocer, who has a store just across from a butcher shop, forty or fifty yards from the schoolhouse, east of the Fair Grounds, hauled the furniture. The furniture was new and his wife bought it when she came from Kentucky and while she stayed at McBride's. Then she went to Colorado Springs, where she boarded at a hotel. She had her two children with her. After returning she went to keeping house. The little boy in Kansas City was called Charlie. Before she moved to Kansas City she called him Tim. While at the first house they bought groceries of the man that moved them to the same, and their meat from the butcher just across the street from the grocery. These parties delivered the goods. While at house No. 2 they bought meat and groceries from a grocer and butcher near Forest avenue, on the north side of Ninth and east of Forest. These parties delivered the goods also. There was no insurance on household goods. The furniture was poor—not very fine. He (Jesse) called his wife Mary. When Frank came, he also went up to the new house and stayed three weeks. Jesse and

myself were also there. Jesse's wife did not visit the neighbors. After remaining in the new house a week, Jesse wrote to Charlie to come over to where they separated near Independence, which he did in a few days. He was then met near Independence by Jesse and Frank.

The object of this meeting was to plan another robbery—the Blue Cut one. Charlie then went back home and got Dick and my brother, and we were all to meet at the same place three or four nights afterward, which we did. Six of us went there to rob the Chicago & Alton train. That night we came down between Kansas City and Independence and stayed in the woods. We intended to rob the Chicago & Alton train the next night—the western-bound train, I mean. We would have robbed the eastern-bound train, but there were two of them, and we did not know which of them had the most money. Jesse was our leader here also. The arrangement was as follows: We were to blockade the track with rock and stop the train if possible by waving a lantern with a piece of red flannel around it. Jesse and myself were to take the north side of the train. We were to keep the people from coming out by firing, etc. Frank and Dick were to take the south side of the train, and Wood and Charlie were to flag the train, take out the engineer, make him break open the express car door, and then they—Charlie and Wood—were to rob it. This arrangement was carried out on the night selected next night.

When the Chicago & Alton train stopped at Blue Cut, Charlie and Wood made the engineer get his hammer and knock on the express car door (side door), the side Jesse and myself were on. After knocking several times the express messenger opened the door and jumped out and sat down on the bank. Charlie and Wood then went in, but they couldn't find the messenger, they supposing that the man who jumped out was the baggageman. One of them (Charlie and Wood) called out to Jesse that they could not find the messenger. Jesse then said: "There he sits on the bank with the engineer and fireman. Kill him if he does not get in and open the safe." The messenger said, "I am not the messenger." Charlie and Wood then covered him with their pistols and said, "Get in or we'll kill you." The engineer said: "You had better get in. They have found you out." He then got up and went in, opened the safe, and I think they made him put the contents in the bag. We had a bag for the plunder. They then accused him of hiding part of the contents, and Charlie hit him over the head with his pistol once or twice and fired it off for the purpose of scaring him. He was scared. They made a further search and found the messenger's pocketbook, containing about \$60 (a \$50 and a \$10 or two \$5's), and his watch and chain.

This watch and chain Wood kept, and afterward pawned it in Louisville, where it afterward found its way into the keeping of Detective Blight of Louisville, after this manner: Wood, when he was arrested for killing the new negro, left the pawn ticket on the

mantelpiece upstairs at home, from which place Silas Norris, my father's present father-in-law, who was then living with us, stole it and gave it to George Hunter of Bardstown, Kentucky, who in turn gave it to Blight. My father afterward went to Louisville for the watch, got it, and Blight presented the ticket about ten minutes afterward. He saw my father, told him it was a stolen watch, then father gave it up. Wood shot the negro on the fence for calling him a horse-thief, etc. He did not know my brother heard him, and begged hard for his life.

After Charlie and Wood came out of the car they told Jesse they did not have any money. Jesse then said, "We had better rob the passengers." They then started through the train, beginning at the smoker and going to the rear. Wood carried the bag (a common meal sack). Charlie went in front with a pistol in each hand and made the passengers deliver up their valuables and put them in the sack. I stood at the front door of each car as Charlie and Wood went through, to prevent their being shot in the back. When we reached the chair car, Frank got on. He did not go through the car, however. Everybody was badly scared. As we were coming back through the sleeper, Charlie found a bottle of wine and took a drink. We also got some cake out of a basket. We got five watches, including the expressman's. Wood took the one which I have spoken of. Charlie Ford got two, one a fine gold one and chain (English make) and a silver one. I got a silver one and Jesse got the conductor's, a nickel, open-faced stem-winder. We settled the division of jewelry as follows: Each article was sold to the highest bidder, and this bid was put in as so much cash and then the cash divided equally. Frank in this way got a set of Mexican jewelry. To go back a little: After we got through searching the passengers, Jesse came into the sleeper from the rear, and told the porter if he didn't hunt up all the money that was hid he'd kill him. The porter said he hadn't hid any, that they had gotten it all. Jesse then went to the first seat, turned it up and got about \$60 and a gold watch. He then went to a brakeman and told him the same thing. The brakeman said, "I gave you 50 cents—all I had." Jesse then gave him \$1 or \$1.50, saying, "This is principal and interest on your money."

We then released the prisoners, and waited until they had removed the obstructions, shook hands with the engineer and fireman, and the train moved on. We all then went north of the road, about half a mile, in a big bottom, and divided the proceeds as I have said. Each man's share was estimated to be worth about \$140.

Jesse in this robbery had a pair of pistols, a .45 Colt and a .44 Smith & Wesson and a breech-loading shotgun of smaller caliber than No. 10. He had a cartridge belt for his buckshot cartridges. He had about thirty of these cartridges. This belt had a supporting strap over the shoulders. Had also two cartridge belts for pistols. Frank had a pair of .44 Remingtons and a Win-



chester rifle and two cartridge belts. The same cartridges fit both pistols and rifle. Dick had a breech-loading shotgun, which two convicts escaping from the penitentiary took from a guard and traded to Bill Ryan for two suits of clothes, who in turn traded it to Dick Liddil for a horse. Dick also had a pair of Colts of .45 caliber and two cartridge belts; he carried his gun cartridges in his pocket. Charlie had one .44 Remington and .44 Smith & Wesson and two belts. Wood had one .44 Remington, a Winchester and two belts. I had two pistols, one .44 Smith & Wesson and one .45 Colt's and two belts. Before we got there (Blue Cut) I swapped my arms for Wood's.

After dividing, Jesse, Charlie, Frank and myself went through the fields, passed through the edge of Independence, struck the Missouri Pacific track near Independence and walked down it four or five miles, left it and crossed the Chicago & Alton track and crossed the Blue at the bridge on Independence avenue and continued on the road to Kansas City. All of us went to Jesse's house. We were just in the edge of the city when the heavy rain came up. Dick and Wood tried to cross at Blue Mills, but found officers guarding it. They went up the river, separated, and Wood crossed somewhere and went to Mrs. Bolton's. Dick went to one of the Hudspeths'. He also stayed one night at the house of some one who was mother to the girl that went to Oregon with the man that murdered some one [the wife of Bud Thomas, hanged in Oregon]. In a few days he crossed the river at Lexington and went to Mrs. Bolton's. Charlie, next day after the robbing, took the train at Kansas City and went home to Ray County. Frank and myself stayed in the house for two or three weeks. Frank and his wife and child, who had within the last two or three days returned from California, where they had been visiting their brother, young Sam Ralston, then went over to Mrs. Samuels' in a buggy hired of some liveryman in Kansas City. Charlie, in a day or two, drove the buggy and horse back. He stayed at Jesse's a day or two and then went back to Mrs. Samuels'. He stayed there a day or two and then came back to Kansas City. Then he went home to Ray County. Frank drove over to his mother's Sunday evening, and I left for the same place on the train next evening; walked out from Kearney. I stayed there four days. Frank and I then rode down to Mrs. Bolton's. I rode Charlie's horse and Frank rode John Samuels'. We stayed there two days, having arrived Friday night and leaving Sunday night. Took the Wabash train at Richmond and Lexington Junction for Danville, Illinois, and from thence to Indianapolis, Indiana. Frank, Charlie and myself were together. Charlie and Frank went to Cincinnati, Ohio, and I went home. Have been there ever since till arrested. Don't know what became of Frank's wife. Frank said he was going to Covington or Cincinnati and rent a house and Charlie and myself were to stay with him.

About the middle of October, 1881, Frank wrote me a letter,

mailed at Samuels' Depot, Nelson County, Kentucky, and dated there, which read about as follows:

"I will be at your house on (some stated date).

Respectfully,                      JOE."

This letter was addressed to Clarence B. Hite, Adairsville, Kentucky, and meant: "Meet me at Doney Pence's or Mr. Sears', Nelson County, Kentucky."

I replied that I was sick and could not come. I wrote in this way in order to have an excuse for not going. I directed this letter to "Joe," and signed my name. "Joe" inclosed it in an envelope and mailed it, without explanation, to Doney Pence, Samuels' Depot, Kentucky. Pence would understand what to do with the letter. A few days afterwards Frank wrote me another letter, expressing regrets at my illness. This was the last I ever heard from him (Frank) or his wife, directly or indirectly. Have never heard from Charley since this last letter was written. I have never seen Jesse nor his wife since the day I left Kansas City for Mrs. Samuels', as I have above stated.

When I left he (Jesse) walked with me west on Ninth street to a little church on the northeast corner of Ninth street and Lydia avenue, Kansas City. We shook hands and parted. I have heard from him, however, since. About two months after I left Kentucky, and about one week before Johnnie Samuels was shot, Jesse wrote me a letter. It was postmarked Kearney, Missouri, but I think was written in Kansas City. The envelope enclosing this letter was directed to Miss Nannie Mimms, Adairsville, Kentucky. He said in substance that I had better leave home; Dick was in with the detectives and they would soon take me away. He wanted me to come to him, and said I could go either to Tom Mimms', of Kansas City, or to his mother's and find out where he was. This letter began "Dear Jeff," and was signed John Samuels. I answered this letter in three or four days, and directed it to Tom Mimms, Kansas City, and on the inside I wrote in substance, after giving date and my address, that I could not leave home, that I did not consider myself in danger, etc.; to write again in about two weeks if he did not hear from me. I signed myself "Clarence Browler" (my first two names) and commenced it with "Dear Tom," and at the top wrote "Please deliver." Mimms would understand by this that the letter was for Jesse James. This was the last I ever heard of him, directly or indirectly. I received this last letter during Christmas. I omitted to state that I received another letter from Jesse about one month prior to this one above described. It was mailed at Kearney, Missouri, and addressed to Miss Nannie Mimms, Adairsville, Kentucky. It began "Dear Jeff," and was signed "John Samuels." It stated, in substance, that he was getting lonesome and wanted me to come out and live with him. He asked me all about Wood's scrape with the negro, and all about the family. He told me to address my answer to John Samuels and he would deliver it. I answered this, also, and addressed the envelope

to "John Samuels, Kearney, Missouri," and signed my name "Clarence Browler." I told him, in substance, that my business was of such a nature that I could not leave home very well; that I was in business, and that if I left I might not be able to get back into it again, that I could not come. I am perfectly familiar with Jesse's and Frank's handwriting and also their mode of communicating with their friends, and the foregoing are samples. When letters are written to any members of the gang in Clay county, Missouri, the envelopes are addressed to "John Samuels, Kearney, Missouri," and he delivers them. When written to any of them in Jackson county, Missouri, they are addressed to "Tom Mimms, Kansas City, Missouri." When written to any member in Logan county, Kentucky, they are addressed to "Miss Nannie Mimms, Adairsville, Kentucky." When written to any of them in Nelson county, Kentucky, they are addressed to Donny Pence, Samuels' depot.

These parties are all firm friends of the fraternity, harbor and give them information.

To resume; my brother and Dick left Mrs. Bolton's in Ray county, Missouri, about two weeks before I left Missouri for Kentucky and came to my father's house. Wood and Dick had a shooting scrape about one week after they arrived and Dick left, leaving his baggage and cartridge belt. He came back to Mrs. Bolton's in Ray county in just a few days before Frank, Charlie and myself left for Kentucky. I have never seen nor heard from him since. Wood, about one month after reaching home, shot the negro, and about ten days afterward was arrested, made his escape and left, saying we would never see him again. Since the Blue Cut robbery Jesse nor Frank have not been at our house.

Jesse killed Ed Miller. He killed him in Jackson or Lafayette counties last spring was a year ago. They were in a fuss about stopping to get some tobacco, and after riding some distance, Ed shot at Jesse and shot a hole through his hat and then Jesse turned and shot him off his horse. The young fellows now in jail charged with being in the Blue Cut robbery, I have never seen. They were not in the robbery. The watch I got out of the Blue Cut robbery is at home. Just before I was arrested I hid it between the bed ticks. The fine gold watch Charlie got he traded to Dick Liddil. The silver watch he left at home when he went east with us. Frank gave the jewelry to his wife that he got out of the Blue Cut robbery. No jewelry came out of the Winston robbery. Jesse, Dick and Bill Ryan all told me that last spring a year ago they met four officers in Jackson county and rode by with drawn pistols. Not a word was spoken.

Jesse said last summer if he only knew on what train Governor Crittenden was he would take him off and hold him for a ransom—thought he could get about \$25,000.

## THE TRIAL OF ISAAC ROGET FOR CONSPIRACY TO DEFRAUD, NEW YORK CITY, 1817.

### THE NARRATIVE.

Peter Favours, the mate of a schooner sailing from a Maine port, was asked by one Blois to join him and two other Frenchmen named Roget and Daulmery in a scheme to make a lot of money. He agreed to be a party to the conspiracy, which was as follows: His schooner, the Ocean, was to sail to Havre, France, and on it Blois, Daulmery and Favours were to go as passengers. The captain, Kelso, was to be let into the scheme but the new mate, Wolcott, was not to know what was going on. When they got to France a quantity of fine goods, mostly silks, were to be purchased in Paris and marked by the customs officials as valuable goods and then the boxes were to be taken to Havre, where the custom house officers would pass them, relying on the examination and marks of the Paris officials. But before they left Paris the boxes were to be unpacked and the silks taken out and re-filled with straw, sand and other rubbish. Then on the return voyage from Havre the ship was to be sunk. Roget, who was to remain in New York was in the meantime to effect insurance on the supposed boxes of silks to a large amount. If everything went as planned the profit would be \$40,000, of which Roget, Blois and Daulmery were to have \$10,000 each, and Favours and the captain \$5,000 each.

Everything went off as planned to a certain point. The Ocean arrived safely at Havre with the conspirators, the silks were bought, were passed by the customs, the boxes emptied and refilled with rubbish; then put on board the vessel, which was sunk near the Bahamas, the people on board all getting to land safely. But before the insurance money could be collected, another Frenchman named De Rosseau, who knew of the scheme, revealed it to the companies, and later Favours turned state's evidence.

Roget, Blois and Daulmery were indicted, but as only the first could be found in this country, he alone went to trial. The proof was very clear, and he was convicted and sentenced to a term in prison.

### THE TRIAL.<sup>1</sup>

*In the Court of General Sessions, New York City, May, 1817.*

HON. JACOB RADCLIFF,<sup>2</sup> Judge.

*May 5.*

The prisoner (with Elias Blois and Jean Baptiste Daulmery) was indicted during the last term, for conspiring together on the first day of July, 1816, at the city of New York, to sink and destroy a certain vessel called the schooner Ocean, on a pretended voyage from Havre-de-Grace, in the kingdom of France, to some port in South America or the United States, for the purpose of defrauding divers persons to the jurors unknown. The indictment contained ten counts, in several of which the further object of the conspiracy was alleged to be, the taking in at such port in the kingdom of France, for a cargo, certain rubbish of no value, enclosed in bales or boxes with the custom house mark thereon, as and for true and genuine goods, and effecting insurance thereon, to a great amount, for the purpose of defrauding the underwriters. He pleaded *not guilty*.

*Hugh Maxwell*,<sup>3</sup> District Attorney; *Thomas A. Emmett*,<sup>4</sup> *O. Hoffman*,<sup>5</sup> and *Jonathan Fisk*,<sup>6</sup> U. S. District Attorney, for the Prosecution.

*Cadwallader D. Colden*,<sup>7</sup> and *David Ogden*,<sup>8</sup> for the Prisoner.

*Mr. Maxwell.* Gentlemen of the jury. This is a prosecu-

<sup>1</sup> New York City Hall Recorder. See 1 Am. St. Tr. 61.

<sup>2</sup> See 1 Am. St. Tr. 61.

<sup>3</sup> See 1 Am. St. Tr. 62.

<sup>4</sup> See 1 Am. St. Tr. 63.

<sup>5</sup> See 1 Am. St. Tr. 540.

<sup>6</sup> See 1 Am. St. Tr. 675.

<sup>7</sup> See 1 Am. St. Tr. 6.

<sup>8</sup> See 1 Am. St. Tr. 63.

tion of no ordinary degree of importance. Isaac Roget, now on trial, is indicted with two others, for conspiring together to sink and destroy the schooner *Ocean*, on the high seas. This conspiracy was carried into effect. The facts, gentlemen, which will be given in evidence, for the purpose of establishing the guilt of Roget, are numerous and somewhat complex; but I shall endeavor, in a brief manner, to detail the principal facts, that you may with the greater facility understand and apply the testimony which we shall introduce in the progress of the cause.

Early the last spring, gentlemen, Peter Favours, a Frenchman by birth, and a resident of Nobleborough, in the District of Maine, having been for some time then past engaged in transporting spars and other lumber, from that country to this city, was applied to by Blois, one of the conspirators, who became acquainted with him in this city, and first made a proposition to him to induce him to become engaged in the projected voyage, the nature of which I am about to explain. The approach was first made in a guarded, confidential manner; and for the purpose of inducing Favours to enter into the scheme, which he hesitated to do, the conspirators made him jointly concerned in the avails of the contemplated undertaking. Several secret meetings were held, at places which will be pointed out in the course of the trial, and in the month of June, 1816, a concert was entered into between Roget, Blois, Daulmery, and Favours, to carry into effect the nefarious scheme which is the subject of this indictment. A vessel called the schooner *Ocean*, of which Favours was the mate, and one Kelso the captain, was to proceed on freight from this city to Havre, in the kingdom of France, in which Kelso should continue the captain, and Blois, Daulmery and Favours, should go out as passengers. When the vessel should have arrived at Havre, the passengers were then to proceed to Paris, and purchase a quantity of fine goods, consisting of silks, handkerchiefs, and other articles, have them packed in bales or boxes, and regularly entered, examined, and marked, at the custom house, for transportation. These goods were then to be unpacked in a secret manner, and straw, sand, and

other rubbish, corresponding in bulk and weight, substituted in lieu of the genuine goods, which were to be put in similar bales and boxes again, passed and marked, and displaced as before, until by this process, sufficient false goods should be obtained for the cargo. This rubbish was then to be transported to Havre, where, as will appear in the evidence, the Paris custom house mark procures a pass for goods, without a further examination. They were then to be shipped on board, and the vessel was to be cleared for, and proceed, to some port in the United States. On her return, she was to be scuttled and sunk at sea, and, if possible, on the coast of France. Insurance was to be effected in divers places in this country, on this vessel and her cargo, as a cargo of genuine goods passed at the custom house. Roget, Blois, and Daulmery were to have three fourths of the avails of the concern, and Favours and the captain the other fourth; and the amount of gain was calculated at \$10,000 each share, making in the whole \$40,000.

In pursuance of this conspiracy, the vessel was procured, and sailed for Havre some time during the month of July last. Blois, Daulmery, and Favours, who went out in the vessel, proceeded to Paris, purchased a quantity of genuine goods, and had them regularly packed in bales or boxes, and passed at the custom house, and taking them in a back store, near the fish market in Paris, took out the goods, and substituted wood, sand, and other rubbish, corresponding in weight and bulk, and put the genuine goods in similar boxes, and had them again passed at the custom house, and again displaced, until ninety-six boxes of rubbish were thus prepared and transported to Havre. There the custom house mark at Paris being found on the boxes, they were shipped without a further examination. The vessel sailed from Havre on the 19th of December last. The mate of the vessel, Henry R. Wolcott, had not been intrusted with the secret object of the expedition, which was unknown to any one on board, except the captain and Favours. After several abortive attempts by Favours, to sink the vessel on the coast of France, which were prevented by Wolcott, on the 25th of February, the former

succeeded in effecting his object, while the hands on board, including Wolcott, by a preconcert, had been sent aloft. The vessel at this time was about five hundred miles from the Providence Bahamas. A small quantity of provisions was sent on board the boat, and after several days, the crew, consisting of seven persons, arrived at one of the Bahama Islands. Previous to the destruction of the vessel, and on the 27th of January, she arrived at the Isle of May, where Favours gave information to Roget, by a letter sent by another vessel. On this information, Roget and others concerned proceeded to effect insurances in different places on the vessel and goods, as and for genuine goods, to a great amount.

Thus far this nefarious undertaking had succeeded, and no doubt Roget and the others concerned, were felicitating themselves in the prospect of the golden harvest they were about to reap. But, gentlemen, even at this time, and while the reward of fraud and iniquity was but just within the reach of the conspirators, they knew not the slippery foundation on which they stood. This scheme, so artfully planned, and so adroitly managed, was then already disclosed. One of the confidants in this dark transaction, who was supposed to be in the interest of the concern, proved treacherous. This was a Frenchman by the name of De Rosseau. He had been applied to almost at the commencement of the conspiracy, by Blois, to assist in the undertaking; and was afterwards instrumental in bringing the whole scheme to light. He gave information to several of the insurance offices in this city, and wrote to Boston, to prevent insurance from being effected on the schooner Ocean.

These, gentlemen, are the prominent facts. We shall introduce Favours and De Rosseau as witnesses, and fortify their statements by many corroborating circumstances. If honesty and fair dealing are to be cherished in a commercial community; if the fair character of the American merchant is worthy of support at home and abroad; if, in fine, gentlemen, the whole community is concerned in the detection and punishment of that species of fraud and villainy, which aims at the subversion and ruin of our commer-



cial prosperity, then, should the testimony warrant the conclusion that the defendant, now on trial, was engaged in this conspiracy, the prosecution will be entitled to your verdict.

#### THE WITNESSES FOR THE PROSECUTION.

*Peter Favours.* Am a Frenchman by birth, have lived in this country twenty-five years, in Boston, Cape Cod, and at Nobleborough, Maine, where my family now resides; follow the seafaring business; know Elias Blois, Isaac Roget, Jean Baptiste, Daulmery, and Jean Alexander De Rosseau. Last spring I came to this city in the ship Betsey of Nobleborough, loaded with spars and lumber, of which vessel I was mate. Elias Blois came on board and entered into conversation with me; said I was a man who deserved a better employment; told him that I was well satisfied with my employment; said he had a voyage in view of great importance; invited me to breakfast, and informed me that he wanted a small vessel of about one hundred and fifty tons to charter, and offered me employment therein. The object was to charter a vessel to France, and having a brother in that country, with whom I had business to transact, was induced to listen to the proposition.

Returned to Nobleborough, found a letter from my brother in France, and was anxious to go. Came again to this city in the schooner Ocean, of which Moses Kelso was captain, and myself mate. On our arrival, Blois invited me to dine, and told me to refer the captain to Daulmery, to get a freight for the vessel. Next

day went with captain Kelso to Daulmery, when the arrangement was made to send the vessel on freight to Havre.

First saw Roget, at Daulmery's counting-house, in Pearl street, where Roget, Blois, Daulmery, and myself, only were present. We went into a back room, and it was then agreed that Roget, Blois, and Daulmery were to have three shares, and the captain and myself the other share in the projected voyage. It was agreed, to purchase thirty casks of potash and some logwood as freight, and to get as much other freight as possible.

The object of the voyage, as agreed on, was, that the vessel, when freighted, should proceed to Havre, and a brother of Roget in that country was to furnish money, purchasing silks and other articles, which should be put up in bales and boxes, and marked at the custom house, which goods should be taken out and false goods put in their place. After thus procuring a cargo, the vessel was to be sunk on her return home, for the purpose of deriving a benefit from insurances to be effected.

The next meeting was at the house of the mother of Daulmery, at the village of Greenwich; was on Sunday, when I arrived, found Roget, Blois, and Daulmery in the garden. They appeared very glad to see me,

and Roget, inquired what progress I made in loading the vessel. Asked Roget for \$100, which he brought me the next day on board the vessel. The object of the voyage at this meeting was again discussed, and understood by all present, and we joined hands in parting.

The next meeting was appointed by Blois, to be at his house, corner of Chapel and Duane streets, where I found Blois and Daulmery. After breakfast Daulmery retired and an old gentleman, named De Rosseau, came, whom Blois introduced to me as an old captain of his, whom he wanted to go in the Ocean as a passenger to France, and work his passage. Blois told me De Rosseau was to sail to Bordeaux in the Rebecca, and return in the Ocean, for the purpose of doing the deed as he had once done before.

Shortly after I informed the captain of the secret object of the voyage, and of the share we were to have. He agreed to the proposal.

At the meeting at the house of Blois was introduced to a Frenchman named Sauvignac, whom Blois told me he was anxious should be concerned; for, that Roget fell short of funds, which Sauvignac could furnish. Blois told me, he did not wish Roget to know that Sauvignac was engaged in the concern.

The vessel sailed in July, and Blois and Sauvignac came on board at Sandy-Hook, and the second day after we sailed, Daulmery came on board in a small boat from this city. These went out as passengers in the vessel. We had forty-five days passage to Havre; where, after staying

four days at a tavern, where we all boarded, Blois and myself took stage for Paris. We left Daulmery at Havre, and when we arrived at Paris found him there. Roget's brother at length came. A short time after Daulmery purchased a quantity of silks and shawls, which were brought to his lodgings. About thirty-seven bales of these goods were put up and carried to the custom house, inspected and marked. The bales were then taken to a back room in a store near the fish market, where Daulmery, Blois, Sauvignac, and one Le Clare were engaged six weeks in unpacking the bales, and putting therein rubbish, consisting of wood, paper, stones, straw, and sand; answering in weight and bulk with the genuine goods, which were again put in similar boxes, and again inspected and marked at the custom house, until, from the goods, they had prepared for transportation ninety-seven bales or boxes of rubbish, on which the covers and stamps of the custom-house were nicely replaced. The genuine goods were then sent to Bordeaux, and the rubbish to Havre, consigned to Tourette, Wells, & Co.

When they first began to pack and shift the goods I was obliged to go to Calais on business. Blois told me that they had taken into the concern Le Clare and Le Mercie, for the purpose of assisting in the project with funds. He gave me twenty double louis d'ors to buy a large boat for the purpose of saving ourselves when the vessel should be sunk. I procured a large clinker built boat, of nineteen feet keel, having two masts, a

bowspirit, and three sails. At Havre he gave me a memorandum in writing, containing the address of "Messrs. Bonnet & Fils, 40 rue James, Bordeaux," that, should the vessel be sunk on the coast of France, I might call on that house for assistance or supplies.

We sailed from Havre on the 19th of December, bound to Boston, with seven persons on board. I was a passenger, and one Henry Wolcott was mate, who had no knowledge of the plan for sinking the vessel. The first night, we cleared Cape Bar-fluer, and the next night there came on a very heavy squall of wind. While all hands were engaged at work forward, the captain told me to sink the vessel. I went below, and bored four holes in the bottom of the vessel with an auger, and in a short time the water gained rapidly.

The mate found out that the vessel had sprung a leak, and went below with me, and ascertained the place where the water came in; and by drawing a sail under her bottom, he so far restrained the leak, that at length he succeeded in stopping the holes. There was a violent gale for twenty days, and the weather too rough to admit the execution of our design. We ran south for the trade winds, and attempted to get into Madeira, but could not, by reason of the gale.

The next attempt I made was on eighteenth of January, when the vessel was near the island of Teneriffe; this time I bored several auger holes nearer her keel than before; it was with difficulty that she was prevented from sinking by the working of two pumps. The mate, as be-

fore, with my assistance, plugged up the holes. On twenty-seventh January we arrived at the Isle of May, at which place I wrote two letters to Roget, informing him I expected to be soon in Boston with his goods.

On 25th February, while the hands were engaged, and the mate and boy were aloft bending a topsail, I bored several holes in the bottom, and before it was discovered by the boy, who went below for a light, so much water was in the hold that it was impossible to free the vessel. We took the boat and put therein a barrel of water, half a barrel of flour, and some pork, and, seven of us being on board, shaped our course for the Providence Bahamas, about five hundred miles distant. The place where the vessel sunk was in lat. 30, long. 60, about five hundred miles N. E. from the Isle of Thayer. In four days we made the Isle of Thayer, one of the Providence Bahamas; arrived here about a month ago, and, with the captain, called on Roget, who appeared to be very glad to see us; related to him the particulars of the voyage, and he advanced to me at different times about \$150, of which I made a memorandum at the time in my pocketbook.

I set down the amount, because Roget told me when Daulmery came I was to have my part of the avails of the voyage. Roget said that De Rosseau had been intrusted with the whole secret, and that he (Roget) suspected that De Rosseau had betrayed us. Roget desired me not to be seen in his company, as it would excite suspicion, and told me that I had better be off. I

was arrested as I was about to leave the city in the eastern stage.

The COURT. What was your object in going so far to the south as Madeira? For supplies. We had been detained in the Bay of Biscay a number of days, by a strong W. N. W. wind.

Could you not have made a port in England? We could not: there was a strong northerly wind.

Did not the mate or any of the people on board, to your knowledge, know or suspect your design? I do not think they did. The captain and myself gave out, that the reason of keeping the vessel so far to the south, was for the purpose of taking the trade winds.

*Cross-examined.* Have been indicted in the circuit court of the United States for sinking this vessel, and had been told, that if I turned state's evidence, I should not be prosecuted to conviction; Blois first disclosed the plan as an affair into which himself and others had entered by a previous concert; it was a wicked, shameful thing; and for being concerned I had great reason to be, and was ashamed; there were great advantages held forth, by Blois and the others, to induce me to undertake the voyage.

Am not certain that the brother of Roget, in France, took an active part; although I understood the brother was to be so engaged. La Clare and La Mercie, as understood from Blois, were taken in as partners, to increase the funds of the concern.

The first attempt to sink the vessel was made about five miles

from land, the second about six miles from Teneriffe; and the holes were bored nearer the keel than the first were. The captain, mate, and myself stopped the leaks. It was difficult to discover whether the holes had been newly bored, because the planks were burned black, when they were put on the bottom of the vessel.

*Jean De Rosseau.* Am a Frenchman, have known Elias Blois eight years. Early last spring, Blois informed me that he wished to employ me in the Ocean, but did not, at that time tell me why; first became acquainted with Favours at the house of Blois, at the corner of Chapel and Duane-streets, some time in April last; had not seen, or had any communication with Favours, since he arrived in New York. At the house of Blois, the object of the projected voyage was explained by Blois; that the nature of the voyage was the same as that detailed in the testimony of the other witness. Blois requested me to go out in the Ocean, but told him that I could not go on board that vessel, as I had business to transact in Bordeaux; however, gave Blois encouragement that I would go out in the Rebecca to Bordeaux, and become concerned in the scheme; but, when the vessel sailed, pretended to be sick, and refused to go.

Blois, however, had previously requested me to apprise him as soon as he should have arrived at Paris, and gave a written memorandum, or address, to Messrs. Bonnet & Fils, 40 rue James, Bordeaux. The object was, that I might go to that house in Bordeaux and get such

letters as Blois might send. At this interview, Blois stated that Roget, Daulmery, Favours, and himself, were concerned (all of whom except Roget were to go in the vessel), but did not state the name of the captain.

The vessel sailed on 25th July, and Blois and Daulmery went on board separately, after the vessel had sailed, as I was informed by a daughter of Blois.

Afterwards, in September, met Roget in Broadway, opposite to the Park, and, on inquiring of him whether he had heard of Blois, he affected much surprise, and said, "I do not know who, or what you talk about." I replied, that he, Roget, was wrong in affecting surprise, for I knew as well as Roget the secret object of the Ocean in her voyage. Roget, however, did not appear to understand; we separated without a further explanation.

On first October following, I wrote a letter to Roget, stating, that he had a perfect knowledge of the voyage: that the schooner Ocean had been freighted, in part, and cleared out by Hutchinson and Daulmery; and that it was intended, by those concerned, that she should follow example of the Amiable Mary Ann. This vessel was sunk at sea in the year 1810.

A day or two afterwards met Roget at a Mr. Labouisse's store, and, after retiring with Roget in the yard, delivered him the letter; which, after reading, he tore in a thousand pieces, and told me to keep the affair a profound secret, and he should be satisfied; which I understood to mean that Roget would relieve me from my poverty; after-

wards had a private conference with Roget, in his store, in which he inquired of me in what manner Blois had related him concerning the sinking of the vessel? Upon which I entered into a detail of the particulars of the voyage, as understood from Blois, and Roget expressed the utmost surprise that Blois should have intrusted me with the secret; and again requested me to keep it a profound secret, and he should be satisfied.

The reason I wrote to Roget was, I apprehended that Roget, by reason of his deafness, did not understand the communication made near the Park. Roget had paid me money, at different times, to the amount of \$50.

About first of February last, on an inquiry whether Roget had received word from the vessel, he replied, that he had received word from his brother, living in Bordeaux, who would have nothing to do with the vessel or the concern. Roget also stated, that he was anxiously waiting for advices which would enable him to make insurance on the vessel.

About the 22d of same month, Roget told me that Daulmery and himself had received an invoice of the cargo, which had been a long time coming, and that he was afraid that, by reason of the delay, he should not be able to get the insurance effected.

About first of March, Roget inquired whether I had written a letter to Boston, informing the underwriters concerning the object of the voyage; stating, as a reason of the inquiry, that he, Roget, had made application, and that the underwriters in that town had refused to insure. I

informed Roget I had written no letter to Boston containing such information, which was a fact; though I had, in the month of January preceding, caused such letter to be written by another.

Shortly after the vessel sailed, in July, I disclosed the nature of the voyage to William Lovett, Esquire, president of the "Fire Insurance Company" of this city, and advised him not to take any risk on that vessel, because she was to be sunk at sea, in the same manner as the *Amiable Mary Ann*; also mentioned the matter to Gurdon S. Mumford, and Francis Depau, about three months ago; before which time, I had been referred, by a French gentleman, to William A. Seely, Esquire, for advice in the premises, to whom I communicated the whole affair.

*Cross-examined.* Am a seafaring man residing in New York, having a family in New Orleans. In April, the matter was first communicated to me by Blois, when no one else was present, for the purpose of inducing me to undertake the voyage; to the proposal made I gave him some encouragement, by saying, "Perhaps I may." In May, several private conferences were held between Blois and I, and when the vessel was loading, I went on board at the request of Blois.

Consented to go to Bordeaux in the *Rebecca*, but took no steps preparatory to going, and never intended to go. I never conversed with Roget until September; my object in imparting my knowledge to Roget, was to induce him to advance, or lend me money; have been promised nothing for swearing in this prosecution; but in July last,

told Mr. Lovett that I had an important discovery to make for a small sum of money; Lovett told me he could do nothing about the matter, and refused to offer any sum for the discovery.

I first became acquainted with Blois in 1810, who, with another, came to me to engage me to take command of the *Amiable Mary Ann*, which was afterwards sunk at sea. I did not take command of that vessel, but was well acquainted with the nature of her destination, and advised Blois to be very careful, as he ran a great risk in that enterprise.

At the time the proposal relative to the Ocean was made me, no particular part was assigned me, but I was told I should be perfectly satisfied. I took no pains to dissuade Blois from the undertaking, because I found Blois fully disposed or determined to carry it into effect; understood from Blois, that the object of the voyage was, to fill the vessel with trumpery of divers kinds and make insurance thereon, as, and for, genuine goods.

Was examined before Judge Livingston, concerning this transaction, and had made oath before that magistrate of the facts contained in my examination, which were reduced to writing.

*John De Launy.* My house, at Paris, is the firm of Thuret and Co., a branch of which is at Havre. In June last, a friend having shipped a quantity of cotton in the schooner *Ocean*, Daulmery proposed to me to have the goods consigned to my firm at Havre, and requested an introductory letter to the house from me, which was given,

though in very reserved terms. De Rosseau had often called on me for money, which I refused to pay; but a short time ago I advanced him \$30.

After goods are passed at the customhouse in Paris, and sent to Havre for transportation, the examination at the latter place is very slight: the Paris customhouse mark is considered as sufficient.

*William A. Seely.* The address to Messrs. Bonnet and Fils. of Bordeaux, in the possession of Favours and De Rosseau, is in the handwriting of Elias Blois.

Roget, on the 11th of March last, effected an insurance in the National Insurance Company in this city for \$4,000, at two and a half per cent premium, on the schooner Ocean and her cargo, from Havre to Boston. The vessel is warranted to be safe at the Cape-de-Verd Islands on the 27th of January last. Another policy was effected by Roget on the vessel on the 5th of March, for the same sum, in the office of the National Insurance Company, at a premium of 20 per cent. The abandonment and claim were made on both these policies on the 28th of March. Another policy was effected by Messrs. Hutchinson and Daulmery for \$10,000, in the American Office, at a premium of two per cent in which the warranty was the same as on the other policies.

*Mr. Colden* hereupon stated to the jury, that the nature of the defense did not require a formal opening by the counsel for the defendant. They should first offer in evidence, certain bills of lading and invoices of goods, which were exhibited to the underwriters when the several policies were effected. In the second place, they should introduce testimony from the most respectable sources, of the standing and fair character of the defendant; and, thirdly, contend be-

*William Lovett.* Am President of the Fire Insurance Company of this city; about three months ago, De Rosseau informed me that this plan was in agitation, and advised me not to risk an insurance on the schooner Ocean. De Rosseau gave me the names of those concerned, which were Blois, Roget, Daulmery, and Favours; he had previously, and in the month of July preceding, informed me that a vessel would come to this city from a port so far at the eastward, that the usual course of the mail between that port and this city was nine days, and that this vessel was to be sunk at sea on her return voyage; but that there was no danger in insuring on the outward voyage. I insured on the outward voyage, and was applied to by Hutchinson and Daulmery, to insure on the return of the same vessel, which I refused to do. De Rosseau did not ask me for any money as a reward.

*Gurdon S. Mumford* and *Francis De Pau* said that De Rosseau gave information to them concerning the object of the voyage, and cautioned them against insuring the vessel on her return, in the manner stated by De Rosseau in his testimony. Favours was arrested on the 3d of April, and no person had been admitted to make any communication to the prisoner, except the district attorney.

fore the court and jury, that even, admitting the combination charged in the indictment established by the testimony, still, that the defendant could not be found guilty by any known law of this state.

The counsel proceeded to produce certain letters and invoices, produced to the underwriters at the time the several policies were effected, as preliminary proofs. The letters were four in number, written by Daulmery to Roget; the first, dated at Havre, on the 11th of September, is in the French language, in which the writer, after giving his friend an account of the progress in the business, as if done in the usual course, desires to be remembered to his neighbors; this word being underscored. The second is dated at Paris, the 7th of November, 1816, in which the invoice of the goods is stated at \$6,000; the third is dated November 9th, in which the writer informs Roget, that the Captain had changed the voyage, and was to sail for Boston; and the fourth, bearing date on the 14th of December, enclosed the invoices and bills of lading for the cargo, valued at 36,000 francs, "with regard to which sum," says the writer, "I have debited you with the amount."

#### THE WITNESSES FOR THE DEFENSE.

A number of witnesses testified that the general character of the defendant was fair and unexceptionable. Many of them had known him eighteen or twenty years in this city, where he had lived as a merchant of standing and respectability.

*Alfred Hutchinson.* Am a son of the gentleman of the firm of Hutchinson & Daulmery; the consignments and bills of lading of the schooner Ocean, on which the policies were effected, were received by Roget and the firm above mentioned, on the third of March, by the Minerva-Smyth; and about the same time, letters were received from Daulmery by two other arrivals from France.

Put Daulmery on board the Ocean at the Hook, in a small boat, the second day after the vessel had sailed.

*Cross-examined.* A letter had been received by Roget from Favours, under cover to Hutchinson & Daulmery, dated at the Isle

of May, January 27th, 1816. Was produced and read to the jury.

Favours, in this letter, informs Roget that the vessel had been obliged to put into the Isle of May, that all was well, that they intended to proceed on the voyage the next day, and that Roget would soon receive his goods as he hoped. In the conclusion of the letter, the writer requested Roget to send his wife \$50.

*Henry R. Wolcott.* Was the mate of the schooner Ocean, when she was sunk on the 25th of February last. The boat put on board the Ocean for the purpose of saving the crew, was told by Favours that it was for the purpose of smuggling goods. The first time the vessel sprung a leak, and when I was endeavoring to stop it, Favours came into the hold, and said: "For God's sake, my friend, let her sink: I will give you \$500." Afterwards, on mentioning this circumstance to the captain, he



said that Favours was a d—d fool; told the captain that two of the holes appeared to be new, and the captain replied, that it was impossible; and that the vessel had formerly been used for carrying wood, and that there were a number of old plugholes in her bottom, which had been made for the purpose of letting out water when she was up high and dry on the shore.

It was a difficult matter to ascertain whether the holes in the

bottom had been recently bored or not, because the planks, in steaming, had been burned black, as was sometimes the case in building vessels.

While in Teneriffe, I found in the captain's chest, an inch and a half auger; but did not know for what use it was intended, or the secret object of the voyage. Relating to the loss of the vessel, agree substantially with Favours.

*The Counsel for the Defense*, after expiating on the extreme hardship to which the defendant would be subjected, should the jury rely on the testimony of Favours and De Rosseau, contended, that he could not be legally convicted while Blois and Daulmery were without the jurisdiction of the court.

The statute of the United States (2 Craydon's Dig. 94), provides: "Section 1. Any person, not being an owner, who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or vessel, unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, being thereof convicted, shall suffer death." "Section 2. If any person shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or vessel, of which he is owner, in part or in whole, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons that have underwritten, or shall underwrite any policy or policies of insurance thereon, etc., being convicted, shall suffer death."

*Mr. Colden* contended, that the defendant could not be found guilty of conspiring to do an act which, allowing it to have been perpetrated in the mode disclosed in the testimony, was not cognizable by the laws of the United States, or of this state.

Taking into consideration the first section of the act, Roget could not be said to belong to the vessel, and with regard to the

second section, he was not the "owner in part or in whole;" and, therefore, did not come within the provisions of the statute. If he had committed no offense against the laws of the United States, which alone take cognizance of a crime of this nature, then, surely, he could not be found guilty of this conspiracy.

It was further urged, that there was no positive testimony that Roget was a party to this plot, except that of two professed accomplices; one of whom had sworn under the strong impression that by means of the conviction of Roget, he, the witness, would escape a merited punishment. De Rosseau, by his own showing, was corrupt and infamous, and not entitled to belief; and, although the counsel conceded that a defendant might be convicted on the testimony of an accomplice, yet such testimony ought to be strongly corroborated.

It was not denied but that there had been a wicked conspiracy to sink and destroy the vessel for the purposes stated in the indictment; but the counsel averred that, independent of the testimony of Favours and De Rosseau, not a fact or circumstance appeared to implicate Roget, or make him a party in the conspiracy.

*The Counsel for the Prosecution* argued from the authority of *King v. Kimmersley & Moore* (1 Strange, 193), that one party to a conspiracy may be tried and convicted, though the others are not taken. The only question is, whether the defendant, with others, did conspire to do the act laid in the indictment; and it is immaterial whether more than one is brought to trial.

With regard to the second point, raised by the counsel for the defendant, it was answered, that a conspiracy consisted in combining together to do an act to the prejudice of the rights of others. It is not necessary that this act should be against the provisions of any statute, or the common law.

The common case in the books, of a confederacy by journeymen, for the purpose of raising their wages, shows that a conspiracy may be maintained for concerting to do, or not to do, that which is not enjoined or prohibited by any law. So a conspiracy may be maintained against persons who confeder-

ate together to impoverish another; and the whole range of authorities evince the rule to be, that a conspiracy may as well be maintained against persons who have combined to do that which is contrary to the principles of natural justice, or will operate to the prejudice of the rights of others, as those who have conspired to do an unlawful act.

The striking coincidence between the testimony of Favours and De Rosseau, and the facts established in the case, independent of their testimony, left no room to doubt that the defendant was a party in this conspiracy.

There was a number of very minute particulars in the testimony of Favours, respecting the places where the plan was unfolded to him. Persons are represented at or near these places, who are not joined in this indictment, who might have been brought to detect him, had he not related the truth. The same address of "Bonnet & Fils," of Bordeaux, is left with Favours and De Rosseau. Favours and De Rosseau swear that Daulmery and Blois went on board after the vessel sailed; and one of the witnesses on behalf of the defendant concurs with them in this part, as respects Daulmery. The other partner, of the firm of Hutchinson & Daulmery, had he been introduced as a witness, might have contradicted much which had been stated by Favours, had it been false; and the non-appearance of such a witness strengthens the testimony of Favours.

The letter sent by Favours to Roget, from the Isle of May, requesting him to send his wife \$50, was a strong confirmation that Roget acted in concert with the others, and is wholly inconsistent with his innocence.

*Mr. Emmet*, in commenting on the several letters produced in evidence, contended, that the whole correspondence furnished conclusive evidence of a foul and wicked conspiracy. Why, and wherefore, in one of these letters do we find the word neighbors underscored, unless more was intended by the writer, by that dash, than the word naturally imported?

*Mr. Hoffman*. Gentlemen of the jury: One of the great objects of a prosecution of this nature, is public example. And when a man of the standing and respectability of the defendant, unfortunately, has been seduced by the allurements of

temptation, from the path of rectitude, is not the example which his detection and punishment affords, more impressive, more useful, than if he stood in a lower grade in society? I believe you will say, with me, that the more exalted the offender, the more impressive the example.

The man of low or doubtful character, in the humble walks of life, may indeed be seduced, by a prospect of wealth, to the commission of crimes for which he may be consigned to punishment. In the estimation of mankind he sinks but little below his natural level; and his declension is viewed with a kind of apathy and indifference. But when the man of respectable standing and connections, high in the estimation of his friends with an amiable family, like this defendant, prompted by avarice, in the gloomy recesses of his mind, conceives and projects a dark, malignant scheme, fraught with mischief and ruin—when the felon, trembling with conscious guilt, is arrayed at the bar, and his turpitude is disclosed, the surrounding auditory are struck with wonder, and a deep interest is excited in the community. The equality of public justice is displayed, and the majesty of the law magnified.

It has been said by the opposite counsel that the defendant is less guilty than Favours, and the public prosecutor has been censured for the selection he has made in the objects of the prosecution. But, gentlemen, Favours, in moderate circumstances, and in good employment, was seduced by the temptations held forth by Roget; and, in the view of every intelligent mind, nay, in the sight of the Supreme Intelligence itself, the seducer is infinitely more guilty than the seduced. It is true, that the defendant may, literally, aver, in the language of Macbeth in the play, to the ghost of Banquo,

“Thou canst not say I did it!”

but, in the eye of the law, and, in the eye of heaven, there is no difference between the instigator of the crime, and him that perpetrates—between him who hires to kill, and him who commits a murder.

In a commercial community like ours, where good faith and fair dealing should ever predominate, and characterize the

conduct of our merchants in their domestic and foreign concerns, can there be a more deliberate, wicked act devised, than the one now under consideration?

To the strong proofs adduced on behalf of the prosecution, there is one ground of defense only interposed. The good character of the defendant is relied on as a shield from this prosecution. But whatever may have been his character heretofore, it is now lost forever. It should be considered that this testimony of character is the lightest of all proof. A man may be for a long time a villain in heart and practice; he may revolve in his mind and project schemes in secret which may not meet the light of day. Eluding the vigilance of public justice, he may even proceed to their consummation, without detection or suspicion, and retain the reputation of an honest man. Even when detected, for justice does not always sleep, he may bring twenty witnesses to swear to an unexceptionable character for twenty years; but if a clear case of guilt is established; if proofs, multiplied and concurrent, leave not a shadow of doubt the demands of public justice must be satisfied.

Temptation, gentlemen, is the ordeal, the proof of virtue; and, believe me, it is not presumption to say, that few men, however fair and unexceptionable their character, however respectable their family and connections may be, when subjected to the trial, will escape unhurt. The stronger the temptation, the greater must be the strength in resisting.

Need we recur to history, to show the strong power of temptation even over a mind devoted to the sacred interests of religion, and the service of his God? Advanced to the highest preferments in the church, and at the head of his profession, with a character far above reproach or suspicion, the unfortunate Dr. Dodd will ever afford a memorable example of the frailty of our nature, when assailed by temptation. In a fatal, unguarded moment, he was seduced from his allegiance to the laws of his country and to his God. He fell a prey to avarice, and expiated his offense on a gallows.\*

\* This divine having been a preceptor to the Earl of Chesterfield, an English nobleman, and being in want of about 4,000 pounds, forged a bond against the Earl, and put it into the hands of a broker

RADCLIFF, JUDGE, charged the jury, that an indictment for a conspiracy might be maintained, as well for entering into a confederacy to do an act which would prejudice the rights of others, as for doing an unlawful act. It was an offense at common law; and this prosecution might be maintained, whether the act which is said to be the object of the conspiracy, is or is not prohibited by the laws of the United States. The offense, in the opinion of the court, is the same, independent of any statutory provision.

This was not the first case of this nature which had been adjudicated in our courts. Some years since one Petit was tried and convicted, in this court, for entering into a conspiracy, with others, to sink a vessel at the Hook.

Another point has been raised by the counsel for the defendant. It is said, that as Roget only has been taken, and the others are without the jurisdiction of the court, that he cannot be convicted according to law. But, in the opinion of the court, this objection is unfounded; and should the jury believe that there was a concert between two or more, the indictment may be maintained, and a conviction properly had, against either of the conspirators who may be brought to trial.

In relation to the testimony of Favours, he stood before the court in the light of an approver, and testified to save himself from the gallows. He is a corrupt man, and De Rosseau does not stand in a better situation. Whatever may be the rule in England with regard to the competency of the approver, in the view of the court, no man ought to be convicted on the uncorroborated testimony of an accomplice. Such testimony is too unsafe to be relied on by a jury, and the good character of the

to raise the money, expecting to take it up before it became due. The person who advanced the money on the bond, being a very particular man, saw something in the instrument which did not appear right, and sent it directly to the Earl to have him execute another. The Earl disowned the bond, and the Doctor was brought to trial and convicted. Notwithstanding greater exertions were made to have the royal clemency extended to the prisoner, than had, perhaps, ever been made before in favor of any individual, the Doctor was executed. This was in the year 1777.

defendant is a sufficient shield against the uncorroborated statements of such witnesses as Favours and De Rosseau.

The jury, therefore, ought to look to the other facts and circumstances in the case, independent of the testimony of Favours and De Rosseau.

If they believed the testimony of Favours sufficiently corroborated, and if, from all the facts and circumstances in the case, they believed that the defendant was a party in this conspiracy, it would be their duty to convict, otherwise, to acquit him. The offense of sinking a vessel at sea, for conspiring to effect which the defendant was indicted, was but little inferior to the crime of destroying by fire, a dwelling house on the land. Both offenses, in their nature, were calculated to endanger the lives of men, and deserved the most exemplary punishment.

The *Jury* returned a verdict of *Guilty* and the prisoner was sentenced to imprisonment for the term of three years.

## THE TRIAL OF SAMUEL THOMSON FOR THE MURDER OF EZRA LOVETT, JR., SALEM, MASSACHUSETTS, 1809.

### THE NARRATIVE.

The founder of what was known as the Thomsonian system or the "Herb Doctors" (see Trial of Francis Burke, 4 Am. St. Tr. 1) more than once found himself entangled in the meshes of the law, but always had the good fortune (as had his disciples) to escape. When he told the good people of Salem and Beverly that their doctors were all wrong and he alone all right, he naturally aroused the opposition and anger of the regular practitioners, and when one of his patients died while under his care, it was not strange that an indictment and a trial in the Criminal Court followed. The evidence seemed to show a clear case of malpractice, but under the law as laid down by the Chief Justice, a conviction was out of the question. No jury could say that Thomson did not believe in his system or that he intended to kill and not to cure. And as this was the legal test of criminal responsibility a verdict of not guilty was the only possible one.

### THE TRIAL.<sup>1</sup>

*In the Supreme Judicial Court of Massachusetts, Salem, Massachusetts, December, 1809.*

HON. THEOPHILUS PARSONS,<sup>2</sup> *Chief Justice.*

HON. SAMUEL SEWALL,<sup>3</sup>  
HON. ISAAC PARKER,<sup>4</sup> } *Judges.*

<sup>1</sup> Massachusetts Reports, Vol. 6. Wheeler's Criminal Cases, see 1 Am. St. Tr. 108.

<sup>2</sup> See 2 Am. St. Tr. 550.

<sup>3</sup> SEWALL, SAMUEL (1757-1814.) Born Boston, Mass.; Representative in Congress, 1797-1800; Associate Justice Supreme Court (Mass.), 1800-1813; Chief Justice, 1813-1814; died in Wiscasset, Me.

<sup>4</sup> PARKER, ISAAC. (1768-1830.) Born and died in Boston; graduated Harvard, 1786; member State Legislature, 1791-1795; State



December 20.

At the beginning of the term, *Samuel Thomson* was indicted for the wilful murder of *Ezra Lovett, Jr.*, by giving him, on January 9, 1809, a poison called lobelia, of which he died the next day. The prisoner pleaded *not guilty*.

*Daniel Davis*,<sup>5</sup> Solicitor General, for the Commonwealth.

*Bailey Bartlett*,<sup>6</sup> and *Joseph Story*,<sup>7</sup> for the Prisoner.

*Mr. Davis.* The prisoner, it will be shown, rashly and presumptuously administered to the deceased a dangerous medicine, which in his hands, by reason of his gross ignorance, became a deadly poison. And witnesses will be called who will tell you that he had given similar medicines to other of his patients who had died under his hands. This renders him liable to punishment for manslaughter at least.

#### THE EVIDENCE.

*John Smith.* Am a relative of the deceased, and resided with Lovett; prisoner came to Beverly where we lived, in December a year ago; said he was a physician and could cure all fevers whether black, grey, green or yellow; said the doctors were imposing on the people—they were all wrong, he was right. He used several drugs which he

called queer names. One he called coffee, one well-my-gristle and another ramcats. He soon had a good many patients. On January 2, last, Mr. Lovett sent me for him, for he had been at home several days with a bad cold. Prisoner came that day, Monday, and ordered a large fire to be kindled to heat the room. He then placed his feet, with

Senator, 1796; member of Congress, District of Maine, 1797; United States Marshal (Maine), 1799-1803; Associate Justice Supreme Court of Massachusetts, 1806-1814; Chief Justice, 1814-1830; Royall Professor Harvard Law School, 1816-1827; President Constitutional Convention, 1820; Trustee of Bowdoin College eleven years and Overseer of Harvard twenty-two years.

<sup>5</sup> DAVIS, DANIEL. (1762-1835.) Born Barnstable, Mass.; United States District Attorney, 1796; member State Legislature, 1789-1795; State Senator, 1796-1800; member Constitutional Convention, 1820; Solicitor General (Mass.), 1807-1832. His son, Charles H. Davis, became a Rear Admiral in the United States Navy and was the father of the wife of United States Senator Henry Cabot Lodge. He died in Cambridge.

<sup>6</sup> BARTLETT, BAILEY. (1750-1830.) Born and died Haverhill, Mass.; member of Congress, 1797-1801.

<sup>7</sup> See 1 Am. St. Tr. 44.

his shoes off, on a stove of hot coals, and wrapped him in a thick blanket, covering his head; gave him a powder in water, which immediately puked him. Three minutes after, he repeated the dose, which in about two minutes operated violently; again repeated the dose, which in a short time operated with more violence. These doses were all given within the space of half an hour, the patient in the meantime drinking copiously of a warm decoction, called by prisoner, his coffee. Lovett, after puking, in which he brought up phlegm, but no food, was ordered to a warm bed, where he lay in a profuse sweat all night. Tuesday morning deceased left his bed, and appeared to be comfortable, complaining only of debility; and in the afternoon he was visited by prisoner, who administered two more of his emetic powders in succession, which puked him again during the operation; he drank of the prisoner's coffee, and complained of much distress; Wednesday morning prisoner had his face and hands washed with rum, ordered him to walk in the air, which he did for about fifteen minutes. In the afternoon he gave him two more of his emetic powders, with draughts of his coffee. On Thursday he appeared to be comfortable, but complained of great debility. In the afternoon prisoner caused him to be again sweated, by placing him over an iron pan with vinegar heated by hot stones put into the vinegar, covering them at the same time with blankets. On Friday and Saturday prisoner did not come; Lovett appeared to be comfortable, though complaining of in-

creased debility; Sunday morning, the debility increasing, prisoner was sent for, and came in the afternoon, when he administered another of his emetic powders with his coffee, which puked him again, causing much distress. Monday he appeared comfortable, but with increasing weakness, until the evening; when prisoner visited him, and administered another of his emetic powders, and in about twenty minutes repeated the dose. This last dose did not operate; prisoner then administered pearl-ash mixed with water, and afterwards repeated his emetic portions; deceased appeared to be in great distress, and said he was dying; prisoner then asked him how far the medicine had got down; deceased, laying his hand on his breast, answered here; on which prisoner observed that the medicine would soon get down, and unscrew his navel; meaning, as we supposed, that it would operate as a cathartic. Between 9 and 10 in the evening, deceased lost his reason, and was seized with convulsion fits; two men being required to hold him in bed; prisoner got down his throat one or two doses more of his emetic powders, and remarked to his father that his son had got the hyps like the devil, but that his medicine would fetch him down; meaning, as we understood, would compose him; next morning, the regular physicians were sent for, but the patient was so completely exhausted that no relief could be given. The convulsions and the loss of reason continued, with some intervals, until Tuesday evening, when deceased expired.

*Dr. French.* Am a physician

living in Salisbury; the coffee administered by prisoner was a decoction of marsh-rosemary, mixed with the bark of bayberry bush; do not suppose it injured the deceased. But the powder which Thomson said he chiefly relied upon in his practice, and which was the emetic so often administered by him to deceased, was the pulverized plant, trivially called Indian tobacco; this plant, with this name, was well known in this part of the country, where it is indigenous for its emetic qualities; and it is gathered and preserved by some families, to be used as an emetic, for which the roots, as well as the stalks and leaves, are administered; four grains of the powder is a powerful puke.

*Rev. Dr. Cutler.* The plant spoken of by the last witness is the *lobelia inflata* of Linnaeus<sup>\*</sup>; many years ago, on a botanical ramble I discovered it growing in a field not far from my house in Hamilton; not having Linnaeus then in my possession, supposed it to be a nondescript species of the lobelia; by chewing a leaf of it, was puked two or three times; afterwards repeated the experiment with the same effect; inquired of my neighbor, on whose ground the plant was found, for its trivial name. He did not know of any; but was apprised of its emetic quality and informed me that the chewing of one of the capsules operated as an emetic, and that the chewing more would prove cathartic. In

a paper soon after communicated by me to the American Academy, I mentioned the plant with the name of *lobelia medica*; did not know of its being applied to any medical use until the last September, when being severely afflicted with the asthma, Dr Drury of Marblehead, informed me that a tincture of it had been found beneficial in asthmatic complaints. I then made for myself a tincture, by filling a common porter bottle with the plant, pouring upon it as much spirit as the bottle would hold, and keeping the bottle in a sand heat for three or four days. Of this tincture I took a tablespoonful, which produced no nausea, and had a slight pungent taste. In ten minutes after I repeated the portion, which produced some nausea, and appeared to stimulate the whole internal surface of the stomach. In ten minutes again repeated the portion, which puked me two or three times, and excited in the extremities a strong sensation like irritation; but was relieved from a paroxysm of the asthma, which had not since returned; had since mentioned this tincture to some physicians, and understood from them that some patients have been violently puked by a teaspoonful of it; whether this difference of effect arose from the state of the patients, or from the manner of preparing the tincture, do not know.

*William Brown.* Had been the prisoner's patient for an op-

<sup>\*</sup> *Lobelia*. Class Pentandria. Order Monogynia. Capsule 2 or 3 celled: corol irregular, cloven: antherae united: stigma simple. Species. *Inflata*: stem erect: leaves ovate, slightly serrate, longer than the penduncle: capsules inflated.—Turt. Lin. vol. 4, pp. 259, 330.

pression at his stomach; took his emetic powders several times in three or four days; was relieved from the complaint, which has not since returned.

*Mr. Bartlett:* The Solicitor General stated in his opening that he would call witnesses who would testify that Thomson had given his medicines to several other patients who had died under his hands. He has called just one Brown, and he says the medicine cured him. There is not a word of evidence to show that the prisoner in the course of his very novel practice has experienced a fatal accident among his patients, except in the case of Lovett. We will now call our witnesses.

The CHIEF JUSTICE. We shall not ask you to go into your defenses, as we are of opinion that the Commonwealth has not made out a *prima facie* case under the indictment.

Gentlemen of the jury: As the testimony of the witnesses you have listened to is not contradicted, nor their credit impeached, that testimony must be considered as containing the necessary facts, on which the issue must be found.

That the deceased lost his life by the unskillful treatment of the prisoner did not seem to admit of any reasonable doubt; but of this point the jury were to judge. Before the Monday evening preceding the death of Lovett, he had, by profuse sweats, and by oft repeated doses of the emetic powder, been reduced very low. In this state, on that evening, other doses of this Indian tobacco were administered. When the second portion did not operate, probably because the tone of his stomach was destroyed, the repetition of them, that they might operate as a cathartic, was followed by convulsion fits, loss of reason and death.

But whether this treatment, by which the deceased lost his life, is or is not a felonious homicide, is the great question before the jury.

To constitute the crime of murder with which the prisoner is charged, the killing must have been with malice, either express or implied. There was no evidence to induce a belief that the prisoner, by this treatment, intended to kill or to injure the deceased; and the ground of express malice must fail. It has been said, that implied malice may be inferred from the

rash and presumptuous conduct of the prisoner, in administering such violent medicines. Before implied malice can be inferred, the jury must be satisfied that the prisoner, by his treatment of his patient, was wilfully regardless of his social duty, being determined on mischief. But there is no part of the evidence which proves that the prisoner intended by his practice any harm to the deceased. On the contrary, it appears that his intention was to cure him. The jury would consider whether the charge of murder was, on these principles, satisfactorily supported.

But though innocent of the crime of murder, the prisoner may, on this indictment, be convicted of manslaughter if the evidence be sufficient. And the Solicitor General strongly urged, that the prisoner was guilty of manslaughter, because he rashly and presumptuously administered to the deceased a deleterious medicine, which in his hands, by reason of his gross ignorance, became a deadly poison.

The prisoner's ignorance is in this case very apparent. On any other ground, consistent with his innocence, it is not easy to conceive, that on the Monday evening before the death, when the second dose of his very powerful emetic had failed to operate, through the extreme weakness of the deceased, he could expect repetition of these fatal poisons would prove a cathartic, and relieve the patient: or that he could mistake convulsion fits, symptomatic of approaching death, for an hypochondriac affection.

But on considering this point, the court were all of opinion, notwithstanding this ignorance, that if the prisoner acted with an honest intention and expectation of curing the deceased by this treatment, although death, unexpected by him, was the consequence, he was not guilty of manslaughter.

To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription. And it is not felony, if through his ignorance of the quality of the medicine prescribed, or of the nature of the disease, or of both, the patient, contrary to his expectation, should die.

The death of a man, killed by voluntarily following a medical prescription, cannot be adjudged felony in the party prescribing, unless he, however ignorant of medical science in general, had so much knowledge, or probable information of the fatal tendency of the prescription, that it may be reasonably presumed by the jury, to be the effect of obstinate, willful rashness at the least, and not of an honest intention and expectation to cure.

In the present case there is no evidence that the prisoner, either from his own experience, or from the information of others, had any knowledge of the fatal effects of the Indian tobacco, when injudiciously administered; but the only testimony produced to this point, proved that the patient found a cure from the medicine.

The law thus stated, was conformable, not only to the general principles which governed in charges of felonious homicide, but also to the opinion of the learned and excellent Lord Chief Justice Hale. He expressly states (1 H. P. c. 429), that if a physician, whether licensed or not, gives a person a potion, without any intent of doing him any bodily hurt, but with intent to cure, or prevent a disease, and contrary to the expectation of the physician it kills him, he is not guilty of murder or manslaughter.

If in this case it had appeared in evidence, as was stated by the Solicitor General, that the prisoner had previously, by administering this Indian tobacco, experienced its injurious effects, in the death or bodily hurt of his patients, and that he afterwards administered it in the same form to the deceased, and he was killed by it, the court would have left it to the serious consideration of the jury, whether they would presume that the prisoner administered it from an honest intention to cure, or from obstinate rashness and fool-hardy presumption, although he might not have intended any bodily harm to his patient. If the jury should have been of this latter opinion, it would have been reasonable to convict the prisoner of manslaughter at least. For it would not have been lawful for him again to administer a medicine of which he had such fatal experience.

It is to be exceedingly lamented, that people are so easily persuaded to put confidence in these itinerant quacks, and to trust their lives to strangers without knowledge or experience. If this astonishing infatuation should continue, and men are found to yield to the impudent pretensions of ignorant empiricism, there seems to be no adequate remedy by a criminal prosecution, without the interference of the legislature; if the quack, however weak and presumptuous, should prescribe, with honest intentions and expectations of relieving his patients.

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